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THE LAW C7
OF
SLANDER AND LIBEL

INCLUDING THE
PRACTICE, PLEADING, AND EVIDENCE
CIVIL AND CRIMINAL

With Forms and Precedents

ALSO

CONTEMPTS OF COURT

AND THE PROCEDURE IN LIBEL BY
INDICTMENT AND CRIMINAL INFORMATION

ALSO AN

APPENDIX OF STATUTES

SEVENTH EDITION

BY

HENRY COLEMAN FOLKARD

OF LINCOLN'S INN AND THE WESTERN CIRCUIT, BARRISTER-AT-LAW,
RECORDER OF BATH

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PREFACE

TO THE SEVENTH EDITION.

THE original Treatise of the late Mr. Starkie, which formed the basis of the earlier editions of this work, was published nearly *ninety* years ago, and was comprised in two small octavo volumes; a considerable portion of the first volume being devoted to a "Preliminary Discourse"; which in subsequent editions of this work by the author was termed an introductory "Commentary"; the greater part of which was from the pen of the late Mr. Starkie, and comprised the first 75 pages (in small type) of each of the author's previous editions; but will, eventually, be the subject of a small elementary treatise for the use of Students. So long, therefore, as that introductory Commentary formed part of the previous editions, the author stated on the title page that his work was founded upon the Treatise of that learned gentleman: but now that the Commentary no longer forms part of the present work, and there remains in the text but the merest vestige of the late Mr. Starkie's Treatise, the author feels justified in treating this edition as his own work; the object being that of rendering the text as complete as

possible, with a view to its use as a reliable authority on the law of Slander and Libel in the hands of the practitioner.

And, with that object, after diligent research, collation, and arrangement of the cases subsequent to the edition by Mr. Starkie, the author, in dealing with that long current of judicial decisions, had in his first edition an exceedingly difficult and laborious task; but, adopting the same course with this as with his several preceding editions, *viz.*, that of a careful study of the facts as well as the judgments in each particular case, and group of cases, and of the principles involved therein, he trusts that the result of such his studies, research, and arrangement, as now further set forth in the present edition, may be found as acceptable to the practitioner as, he has reason to believe, were those of his preceding editions.

It should however be observed, with regard to that wide and important branch of the subject known as "privileged occasion," that, even at the present day, cases occasionally arise which involve questions so abstruse and difficult of application, that they are still left in uncertainty by reason of the conflict of judicial opinion: some of those questions, therefore, still remain open for decision by a Court of final appeal. And so also with regard to the subject "fair comment," which, since the Newspaper Libel Acts, has been fruitful of considerable litigation; cases on the subject presenting new and various phases: but, it

appears, that in the absence of any settled principle of law, the question as to what is "fair comment" is one for the jury to decide (under the direction of the presiding judge) with reference to the circumstances and occasion of the publication.

The law of Defamation, in so far as it is founded upon the Common Law of the land, is one of the most scientific branches of the English law; and until a comparatively recent period, was almost untouched by legislative enactment. At the period when Mr. Starkie wrote, the only enactments relating to the subject were, two statutes for the suppression of blasphemy and blasphemous publications, and the Libel Act of 1792, then known as "Mr. Fox's Libel Act"; the latter being chiefly declaratory of the law as it then existed. Since that period several enactments relating to the law of Defamation have been placed upon the Statute book: notably, The Act of 1840 for the protection of persons employed in the publication of Parliamentary papers; The Libel Act of 1843, and that of 1845 for amending the same; The Act of 1855 for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in suits for Defamation; The Obscene Publications Act, 1857; The Newspaper Libel Acts, 1881 and 1888; The Indecent Advertisements Act, 1889; The Slander of Women Act, 1891; and The Corrupt and Illegal Practices Prevention Act, 1895; all which have become law since Mr. Starkie's original Treatise. The purport and effect of these

several enactments, together with the cases decided thereon, are embodied in the text of this edition: and *verbatim* copies of those statutes will be found in the Appendix.

In the edition immediately preceding this one, considerable additions were made in the Criminal Division of the work; amongst which were notes of several important cases that were not in either of the previous editions; particularly some relating to seditious libels, and libels on the Government and Ministers of the day, no traces of which were to be found in any of the law reports; but which were then added from the author's notes of his researches amongst the Crown Office Records at the Rolls Office.

In preparing a new edition of a work of this kind, those only who have conscientiously performed a similar undertaking can fairly estimate the amount of toil, research, and careful condensation involved in the task. In this, however, as in the preceding editions, whatever faults, errors, and failings there may be, the author is alone responsible for them.

H. C. FOLKARD.

4, PUMP COURT, TEMPLE,
LONDON,
January, 1908.

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s. 6; 447	c. 100, s. 29; 367
5 & 6 W. & M. c. 11, s. 3; 531	15 & 16 Vict. c. 76, s. 61; 234, 238,
12 & 13 Wm. 3, c. 2; 89	294, 310
32 Geo. 3 c. 60; 315, 489, 496, 513,	17 & 18 Vict. c. 125, s. 27; 268
521	ss. 79, 81, & 82;
s. 1; 373, 513	328
s. 2; 514	18 & 19 Vict. c. 41; 218, 365
s. 3; 514	c. 55, s. 35; 431
s. 4; 514, 519	19 & 20 Vict. c. 16, s. 1; 475
48 Geo. 3, c. 58; 442	20 & 21 Vict. c. 83, s. 1; 367
60 Geo. 3 and 1 Geo. 4, c. 4; 446	c. 85, s. 21; 233
s. 8; 442,	21 & 22 Vict. c. 90, s. 27; 260
446	22 & 23 Vict. c. 17; 463
50 Geo. 3 and 1 Geo. 4, c. 8, s. 1; 364,	s. 2; 464
371	23 & 24 Vict. c. 32; 218, 365
s. 2; 364	c. 127, s. 22; 259
ss. 8 & 9;	24 & 25 Vict. c. 46, s. 47; 473
364	c. 96, ss. 12 & 13; 10
11 Geo. 4 and 1 Wm. 4, c. 70, s. 9; 442	ss. 27 & 29; 7
2 & 3 Wm. 4, c. 93, s. 2; 395	c. 97; 24
3 & 4 Wm. 4, c. 41, s. 4; 424	c. 100; 24
4 & 5 Wm. 4, c. 36, s. 13; 462	s. 4; 379
6 & 7 Wm. 4, c. 76; 273	28 Vict. c. 36, s. 16; 395
3 & 4 Vict. c. 9; 118, 124	28 & 29 Vict. c. 18, ss. 3, 4, 5, & 6; 511
5 & 6 Vict. c. 38, s. 1; 512	s. 8; 268
6 & 7 Vict. c. 86, s. 21; 72	30 & 31 Vict. c. 142, s. 5; 322
c. 96; 255, 346, 363, 480	32 & 33 Vict. c. 62, s. 66; 394
s. 1; 252, 308, 350	33 & 34 Vict. c. 79, s. 20; 369
s. 2; 206, 225, 226,	36 & 37 Vict. c. 66; 310
252, 308, 350	s. 3; 389
s. 3; 474, 528	ss. 16, 17, & 18;
s. 4; 467, 473, 529	390
s. 5; 467, 473, 476,	s. 25, sub-sec. 8;
529	328
s. 6; 85, 87, 376,	s. 49; 321
442, 467, 473,	s. 67; 350
481, 508, 523,	s. 89; 394
526, 529	s. 91; 351

38 & 39 Vict. c. 77, s. 33 ; 320	47 & 48 Vict. c. 76, s. 4 ; 369
39 & 40 Vict. c. 36, s. 42 ; 369	49 & 50 Vict. c. 48, s. 14 ; 260
c. 59, s. 25 ; 390	50 & 51 Vict. c. 59 ; 5
44 & 45 Vict. c. 58, s. 28 ; 396	c. 71, s. 19, sub-secs. 2, 3, & 4 ; 393
s. 126, sub-sec. 8 ; 396	51 & 52 Vict. c. 25, s. 2 ; 390
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s. 2 ; 137	s. 56 ; 349
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s. 12 ; 273	s. 7 ; 236, 469, 477
s. 13 ; 272	s. 8 ; 465
s. 15 ; 274, 281	s. 9 ; 498
s. 17 ; 469	52 & 53 Vict. c. 18, s. 3 ; 369
s. 18 ; 273	54 & 55 Vict. c. 51 ; 3, 40, 44, 218, 323, 541
45 & 46 Vict. c. 57, s. 4 ; 322	56 & 57 Vict. c. 37, s. 4 ; 352
c. 75, s. 1, sub-sec. 2 ; 238	c. 61 ; 232, 364
s. 12 ; 23	58 & 59 Vict. c. 40, ss. 1 & 2 ; 31
46 & 47 Vict. c. 39 ; 320	s. 3 ; 334
c. 49 ; 328	
s. 169 ; 394	
c. 57, s. 32 ; 59, 333	
47 & 48 Vict. c. 43, s. 7 ; 469	

ADDENDA ET CORRIGENDA.

Page 63. Where an action was brought in respect of a defamatory statement in a newspaper that a house belonging to the plaintiff was haunted, whereby it became and was unlettable, after verdict for the plaintiff with damages, the Court of Appeal ordered judgment to be entered for the defendant, on the ground that there was no evidence of special damage: *Barrett v. Associated Newspapers, Ltd.*, (1907) 23 T. L. R. 666.

Page 109. Unfair report of proceedings in police court: see *Furniss v. Cambridge Daily News, Ltd.*, (1907) 23 T. L. R. 705.

THE LAW OF SLANDER.

CHAPTER I.

SLANDER ; WHAT IS, AND WHEN ACTIONABLE.

Slander : what it is.
Conflict of early decisions.
Present rule of construction.

Slander when generally actionable.
When actionable without proof of special damage.

SLANDER, or oral Defamation, is an injury, for which, by the law of England, an action for damages will lie; but an Indictment will not lie for mere words not reduced into writing (a), unless they be seditious, blasphemous, grossly immoral, or addressed to a Magistrate whilst in the execution of the duties of his office, or with reference to those duties; or uttered as a Challenge to fight a duel, or with an intention to provoke another to send a Challenge (b).

CHAPTER I.
Slander, what is, and remedy for.

Libel or written (c) Defamation is, in the eyes of the law, an injury of a greater and more aggravating nature than Slander; by reason of the more durable publicity thus given to the defamatory matter, and the deliberation of the defamer in reducing the slander to writing. A spoken insult is heard only by those who are present; whereas that which is written may pass into many hands. "*Verba volant, litera scripta manet.*" Two remedies are therefore given in Libel: one by Criminal procedure against the Libeller, the other a Civil remedy by action at law.

There is, however, no branch of the English law in which the early decisions of the Courts exhibit so many inconsistencies as in the cases decided on the law of slander. The evil appears, chiefly, to have arisen from the studious efforts made

Conflict of early decisions.

(a) 2 Salk. 417. *R. v. Langley*, 6 Mod. 125.

(b) *R. v. Philipps*, 6 East, 464.

(c) The term "written" implies

also printing, painting, or other fixed representation, as distinguished from oral defamation.

CHAPTER I.

to strain the meaning (*d*) of defamatory expressions into some sense or interpretation never intended by the utterer; but which, if intended, would be capable of a harmless and inoffensive construction.

Present rule of construction.

Later decisions have trimmed and adjusted the law on this subject; and words are now to be taken in their natural sense, and in such as the hearers were given by the utterer to understand them. *Id certum est, quod certum reddi potest; sed id magis certum est quod de semet ipso est certum* (*e*). And the words must be in themselves applicable to the individual Plaintiff.

Slander when generally actionable.

In the early part of the reign of Queen Anne, *Holt*, C.J., observed, that whenever the words tended to take away a man's reputation he would encourage actions for them; because so doing would much contribute to the preservation of the peace (*f*). And *Fortescue*, J., observed on this ruling in a subsequent case, that it was also *Hale's* and *Twisden's*, JJ., rule; and he thought it a very good one (*g*). In a more modern case *Lord Ellenborough*, C.J., held, that in order to support an action of Slander, it was necessary that there should be—
1. Malice in the Defendant. 2. An injury to the character of the Plaintiff: and 3. That the words should be untrue (*h*). But in ordinary actions of Slander, *express* malice need not be proved; it is to be implied from the slander itself. So with regard to the injury or damage, such will be implied in some cases; in others, to be noticed hereafter, the action is not maintainable without proof of special damage.

The imputation must be false.

It is essential to the claim to damages, that the imputation should be *false*; for as, in point of natural justice and equity, no one can possibly have any claim or title to a false character; so also would it be contrary to the principles of public policy and convenience, to permit a man to make gain of the loss of that reputation which he had forfeited by his misconduct. *In foro conscientiae* it is no excuse that the slander is true; but, in compassion to men's infirmities, and because, if the words spoken are true the individual of whom they are spoken cannot justly complain of any injury, the law allows the truth of the words to be a justification in an action of slander.

The law always presumes in favour of innocence, and therefore does not require a plaintiff to prove the falsity of the

(*d*) *Stanhope v. Blith*, 4 Co. 15.

(*e*) 9 Co. 47.

(*f*) *Baker v. Pierce*, 6 Mod. 23.

(*g*) *Button v. Heyward*, 8 Mod. 24.

(*h*) *Maitland v. Goldney*, 2 East

426.

alleged calumny; on the contrary, it imposes the burden of proving the affirmative on the defendant: the truth of the supposed slander is in effect a ground of justification, which must be substantiated by the defendant: consequently the decisions on this point will be more properly considered in subsequent pages in remarking upon those justifications which are recognized by the law.

The consequence of the slander must be to occasion some injury or loss to the plaintiff, either in law or in fact.

As, in many instances, the immediate tendency of malicious slander is to produce great and irreparable mischief to the party whose character is assailed, though none can be proved, or at least proved in time, so as to save the sufferer from great loss, or even absolute ruin; the law, in the particular instances stated below, on grounds of the wisest policy, considers the very publication of particular slander to be injurious, and to confer a substantive right of action, though no special loss or damage can be proved.

In the first place, then, in what cases does the communication amount to a damage in law? Or, in other words, when is the slander actionable without proof of any special damage?

The general rule is, that where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime or a misdemeanour, or if they are defamatory of a person in his or her office, profession, trade, or calling, they are in themselves actionable: in other cases the party who brings an action for words must show the damage which he has received from them.

The ground of an action for words, in the absence of specific damage, is the immediate tendency of the words themselves to produce damage to the person of whom they are spoken; in which case presumption supplies the place of actual proof.

It appears then, that an action of Slander may be maintained *without proof of special damage*, in the following cases:—

Slander, when actionable without special damage.

1. If an indictable offence be imputed to the Plaintiff.
2. If any injurious imputation be made, affecting the Plaintiff in his Office, Profession, Trade or Business.
3. If unchastity or adultery be imputed to any woman or girl (i).

(i) 54 & 55 Vic. c. 51 (The Slander of Women Act, 1891).

CHAPTER I.

4. If the words tend to the disherison of the Plaintiff: (but if they merely affect his *present Title* or inheritance special damage must be proved).

5. If the Slander be propagated by printing, writing, picture or caricature (termed libel).

It will be considered under each of these divisions, by what rules the extent of the action is limited, and the reasons upon which they are founded.

CHAPTER II.

SLANDER IMPUTING AN INDICTABLE OFFENCE.

Grounds of action generally.

Words imputing crime for which punishment suffered or pardon granted.

General proposition as to actionable slander.

Direct charges of felony and misdemeanour.

Charges of bribery and other indictable offences.

*Words imputing a trespass; stealing things *ferre naturæ*, &c.*

Actionable imputations.

Rule of law as to words of double meaning.

Rule as to words of ambiguous meaning.

Rule as to words of suspicion, or opinion.

As to the degree of certainty requisite.

Words of interrogation conveying charge of crime.

Inferential words generally.

Charge of crime conveyed by words of repugnancy.

Rule, as to criminal quality of the imputation.

Words charging an attempt or a solicitation to commit a crime.

An indictable offence must have been imputed.

Imputations of infectious disease.

CHAPTER II.

Grounds of action generally.

THE immediate and obvious consequences resulting from a charge of an indictable offence are, the party's degradation in society, and his exposure to criminal liability. In the one case the presumption is, that he has lost the benefit of intercourse with society; in the other that he is placed in jeopardy; and that the suspicion excited by the report, may produce a temporary deprivation of his liberty until his innocence can be made manifest (a).

There are reported cases which show, that criminal liability is not always the peculiar and exclusive ground of action, and in which a remedy has been given on account of imputations which, if believed and even proved, could not have subjected

(a) The being of *bad fame*, or reason for commitment. Hawk. b. 2, keeping company with persons of c. 12, pp. 8—11. scandalous reputation, was formerly a

the plaintiff to any future penalty :—For instance, the defendant said, “Robert Carpenter was in Winchester Gaol, and tried for his life, and would have been hanged had it not been for Leggatt, for breaking open the granary of Farmer A. and stealing his bacon” (b). In *Gainford v. Tuke* the words were—“Thou wast in Launceston Gaol for coining!” The plaintiff replied, “If I was there, I answered it well.” “Yea,” said the defendant, “you were burnt in the hand for it!” (c). In the above cases of *Carpenter v. Tarrant* and *Gainford v. Tuke*, (the former of which was cited by Lord Ellenborough, C.J., in giving judgment in a subsequent case (d),) the words import that the plaintiff had been acquitted in the one case and punished in the other; neither imputation, therefore, though believed, could have exposed either of the plaintiffs to future liability. In these and similar instances it is likewise to be observed, that though motions were made in arrest of judgment, the objection relied upon was, that the words contained no direct charge of felony; and it was not insisted upon as essential to the action, that the words must impute an offence which may expose the party to a future prosecution, though there was room in each of these cases for making the objection, had it been thought available. And in the case of *Boston v. Tatham* (e), the court expressed an opinion, that, even allowing that the words fixed the offence to a period, since which the liability to punishment must have been discharged by a general pardon, yet that the words were actionable, *since the scandal of the offence remained*. And although in these cases the principal ground upon which words of this description are held to be actionable, seems to have been abandoned, yet the good sense of the decisions is obvious; for were it otherwise, the slanderer might always secure impunity by cautiously asserting that the party slandered had already suffered the punishment appertaining to the imputed offence (f).

Words imputing guilt, notwithstanding trial and acquittal.

Words imputing crime for which punishment suffered, or pardon granted.

Where the action was for saying of the plaintiff (a tradesman), “He is a returned convict”: the special damage alleged was, the loss of a customer to whom the words were spoken; but the proof of special damage failed, and it was thereupon contended for the defendant that the words were not actionable

Imputation of being “a returned convict.”

(b) *Carpenter v. Tarrant*, Rep. Temp. Hard. 339; see also *Cuddington v. Wilkins*, Hob. 81.

(c) Cro. Jac. 536.

(d) *Roberts v. Camden*, 9 East, 93.

(e) Cro. Jac. 623.

(f) By the Roman law, where the defamatory matter related to a crime which had been either pardoned or satisfied by punishment, the truth of the charge was no defence; the defamation, though true, was punished.

CHAPTER II

in themselves, inasmuch as they imputed no present liability to punishment, but rather that the party had already suffered the punishment; but *Lord Denman*, C.J., ruled that the words were actionable, as imputing to the plaintiff that he was guilty of some offence for which parties are liable to be transported: and his lordship added—"they import, to be sure, that the punishment has been suffered; but still the obloquy remains (*g*);" and it aggravates that obloquy to publish it.

"Felon," and
"felon
editor."

After a person, convicted of felony, has endured the punishment awarded to him for his offence, another person is not justified in stigmatising him as a "felon." Having endured his punishment he is no longer a "felon." And therefore, it is no justification to a libel imputing to a man that he is a "felon editor," to plead that he was once convicted of felony and sentenced to imprisonment. And a replication to the effect that, as to the supposed felony, the plaintiff duly endured the punishment, and thereby became and has ever since been in the same position as if he had received a pardon under the Great Seal, was upheld (*h*).

General propo-
sition as to
actionable
slander.

It therefore appears that although in some instances the presumption of prejudice to the plaintiff in society may be a ground of action for libel, independent of any detriment in a criminal point of view; yet, as a general proposition, it appears to be clearly established that as regards verbal defamation, no charge upon the plaintiff, however foul, will be actionable without special damage, unless it be of an offence punishable in a temporal court of criminal jurisdiction.

Accusations of
Perjury:

Thus, by a long series of cases it has been decided, that to say a man is "forsworn (*i*)," or that he has taken a false oath, generally, and without reference to some judicial proceeding, is not actionable; and the reason is, that in the latter case a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished; in the other, no more than a breach of morality is imputed, of which the law does not take cognizance. So, it was formerly held that, to accuse another of having secreted a will, for the purpose of defrauding his relations, was not actionable (*k*): though a

of secreting a
Will or a
Deed.

(*g*) *Fowler v. Dowdney*, 2 Moo. & Rob. 119, and see *Helsham v. Blackwood and another*, 11 C. B. 111; 20 L. J. C. P. 187.

(*h*) *Leyman v. Latimer*, 3 Ex. D. 15 and 352; 46 L. J. 765; 47 L. J. 470.

(*i*) Mo. 365; Cro. Eliz. 429; Popham, 210; Ow. 62; Cro. Eliz. 135, 609, 720, 788; 1 Vin. Ab. 404; 1 Rol. Ab. 40; Com. Dig. tit. Action on the Case for Defamation, D. 7; 6 Mod. 200.
(*k*) 3 Salk. 327.

person, who by such means possessed himself of the testator's property would be regarded by society as unfavourably as a horse-stealer, or a pickpocket. But now that it has been made a Felony by statute (*l*) to fraudulently conceal any Deed or Will, accusations of the kind, affecting any person within the meaning of the statute, would undoubtedly be actionable. CHAPTER II.

The books abound with cases (*m*) which show that a direct or specific charge of *treason*, or any species of *felony*, whether it existed at Common Law, or was so constituted by statute, has always been considered actionable: to these may be added that of *perjury*, which in its very nature tends to destroy the plaintiff's credit in society: the courts have, however, gone beyond this, and imputations of many other misdemeanours and indictable offences have given rise to a numerous class of decisions. Direct charges
of Felony or
Misdemeanour.

In *Mayne v. Digle* (*n*), it is laid down that *an action lies for any words which import the charge of a crime for which a person may be indicted.* Rule as to.

From the instances cited, and a number of similar ones, it seems difficult to find any other limit for the extent of the action than that laid down in the last-mentioned case; and though there are *dicta* and even decisions to the contrary, both may perhaps be considered as borne down by the current of authorities, in which words have been considered actionable, when charging an indictable offence.

But it is not every unfounded imputation of felony or misdemeanour that is actionable, although it be made in the presence of several persons. And it is always a question for the jury (not the judge) whether the charge was made *bond fide* in the prosecution of an inquiry as to a suspected crime or misdemeanour; also as to whether it was made in stronger language, or in a more public manner than was necessary (*o*). To say of another, "He robbed John White," has been held actionable as imputing an offence punishable by law. If the words were used in any other sense the defendant must show it (*p*). Words imputing an indictable offence are actionable or not according to the sense in which they were fairly understood by bystanders not acquainted with the matter to which they relate (*q*). Question for
the jury.

(*l*) 24 & 25 Vic. cap. 96, ss. 27, 29.

(*m*) See Com. Dig. tit. Act. on the Case for Defamation.

(*n*) Free. 46.

(*o*) See *Padmore v. Lawrence*, 11 A. & E. 380.

(*p*) *Tomlinson v. Brittlebank*, 4 B. & Adol. 630; 1 Nev. & Man. 455; and see *Penfold v. Westcote*, 2 N. R. 335.

(*q*) *Hankinson v. Bilby*, 16 M. & W. 442.

CHAPTER II.

Bribery and
corruption,
words imput-
ing.

Where imputations of felony are made, express malice is implied, unless the defendant can show that the words complained of were spoken on a justifiable occasion (*r*).

During an election of members to serve in parliament, the defendant, holding up money in his hand, said of the plaintiff, who was a candidate, "these guineas are Mr. Bendish's (the plaintiff's) money, and were given me to vote for him: he has bought my vote, and he shall have it" (*s*). It was contended, in arrest of judgment, that no words are actionable unless they subject the plaintiff to a temporal punishment, and that nothing had been said that could subject the plaintiff to an indictment on the statute; but Holt, C.J., was clearly of opinion, that the action would lie, and judgment was given for the plaintiff. It is to be remarked, that bribery is an offence at Common Law (*t*), as well as by statute, and punishable by indictment, or by information.

Where a commission had been awarded out of Chancery to the plaintiff and three others, with the assent of the parties to a suit, to examine witnesses and to hear and determine; the defendant (who was one of the parties) said of the plaintiff, "Sir George Moor is a corrupt man, and hath taken bribes of Richard King (the other party to the suit)" (*u*); and likewise further said, "Richard King hath set Sir George Moor on horseback, with his bribes, to pervert justice and equity." Upon motion in arrest of judgment, the court said, "that the plaintiff having the King's commission to execute, if he take bribes to execute it, it is a breach of the trust reposed in him, and is so great an offence, that he may be indicted and fined at the Common Law;" and the plaintiff had judgment.

In offices of
public trust.

So to charge a person with having given a sum of money to the commissioners to be made purser of a man of war, was held actionable; such an offence being a corruption of a public trust, and a crime both in the commissioners and the person tempting them; the words are therefore actionable, as imputing a criminal charge (*x*).

Charging a
person with
being the
author of a
libel.

In the case of *Sir William Russell v. Ligon*, it was adjudged and agreed, that an action lies for charging a person with being the author of a libel, though the making of a libel is not an offence which concerns life or member, but punishable only

(*r*) *Hooper v. Truscott*, 2 Bing. N. C. 457.

(*u*) *Sir Geo. Moor v. Forster*, Cro. Jac. 65.

(*s*) *Bendish v. Lindsay*, 11 Mod. 194.

(*t*) 3 Burr. 1335, 1359.

(*x*) *Purdy v. Stacey*, 5 Burr. 2693.

by fine and imprisonment (*y*). In this case, it seems, however, to have been averred in the declaration, that the plaintiff was a justice of the peace. CHAPTER II.

To say of a person that he keeps a bawdy-house, is actionable, because the offence is indictable; and though it was formerly held, that such words were not actionable, the reason on which the judgment was given is bad, for it was assumed (*z*) that the offence was not indictable at Common Law. And in a case in which the slander complained of was addressed to the plaintiff's wife, and was as follows:—"You are a nuisance to live beside of. You are a bawd: and your house is no better than a bawdy-house." It was held, that the words were actionable without proof of special damage; and that it was unnecessary to make the wife a party to the action, as the words imputed an offence for which, if true, the plaintiff would be liable to be indicted (*a*). But, where the words complained of were, "The business of a stay-maker does not keep him, but the prostitution of the person in the shop. After it is shut it is as bad as any bawdy-house in the town." At the trial the learned judge left it to the jury to say whether the words imputed to the plaintiff that he kept a bawdy-house, stating his opinion to be that unless they did, the action could not be sustained. And the jury having found for the defendant, the court refused to disturb the verdict (*b*). Imputation of keeping a bawdy-house.

Words imputing to the plaintiff that he has committed unnatural crimes, or been guilty of unnatural practices; and that he had made indecent attempts on the defendant and others, are actionable (*c*). Imputation of unnatural crime.

Where a declaration in slander contained several counts, in some of which it was averred, that the defendant had stated of the plaintiff, that he "had been guilty of most abominable conversation and exposure of his person": on demurrer it was held, that the words were not actionable; but in other counts of the declaration the words laid were, that the plaintiff "had been guilty of abominable conversation and public exposure of Imputations of indecent exposure;

(*y*) 1 Vin. Ab. 423, pl. 27; 1 Com. 249. Dig. tit. Action on the Case for Defamation, 8, 9; 1 Rol. At. 46.

(*z*) Cro. Eliz. 643; *sed vid.* 1 Rol. Ab. 44; 1 Buls. 138.

(*a*) *Huckle v. Reynolds*, 7 C. B. (N. S.) 114.

(*b*) *Brayne v. Cooper*, 5 M. & W.

(*c*) *Thompson v. Nye*, 16 Q. B. 176; 20 L. J. Q. B. 85. It has been held in an American case, that words spoken of a woman imputing that she had intercourse with a beast are actionable *per se*. *Haynes v. Ritchey et ux.*, 30 Iowa 76; 6 Am. Rep. 642.

CHAPTER II. his naked person": and these were held actionable as containing a charge of an indictable misdemeanour (*d*).

of receiving
stolen pro-
perty. So also to accuse another of receiving goods knowing them to have been stolen, the offence being a misdemeanour at Common Law, and a felony by statute. As to what words have been held to convey an imputation of receiving goods knowing them to have been stolen, see the case stated below (*e*).

Embezzlement. Verbal imputations of embezzlement are also actionable, when made of a person with reference to his office; but not in a case where embezzlement could not have been committed, inasmuch as the plaintiff was neither clerk nor servant within the meaning of the statute (*f*).

Blackmailer. A verbal imputation upon a person that he is a "Black-mailer" is actionable, without proof of special damage: as a charge of blackmailing would constitute an indictable offence (*g*).

Words im-
puting a
Trespass. In *Ogden v. Turner*, it was expressly held by Holt, C.J., that to render words actionable it is not sufficient that the party may be fined and imprisoned for the offence (*h*). For that if any one be found guilty of a common trespass, he shall be fined and imprisoned; yet no one would assert, that to say, one has committed a trespass, will bear an action.

Stealing Deer. The words were, "Thou art one of those that stole my Lord Shaftesbury's deer"; and were held not actionable; for though imprisonment be the punishment in those cases, yet per Holt, C.J., "It is not a scandalous punishment; a man may be fined and imprisoned in trespass; for," says he, "there must not only be imprisonment, but an infamous punishment (*i*).

Charge of
stealing furze ;
of stealing
bricks. So the words, "Thou art a thief, and has stolen twenty loads of my furze," were held not actionable, the presumption being that the furze was attached to the soil, and that therefore no felony was imputed (*k*). But for the words "He is a thief, and robbed me of my bricks," the action will lie; for the natural presumption is that bricks are chattels: and it will not be implied that they were parcel of the freehold (*l*).

(*d*) *Torbitt v. Clare*, 9 Ir. L. R. 36.

(*e*) *Alfred v. Farlow*, 8 Q. B. 854 ;
15 L. J. Q. B. 260.

(*f*) *Williams v. Stott*, 1 Cr. & Mees.
675 ; 3 Tyrw. 688.

(*g*) *Marks v. Samuel*, (1904) C. A. 2
K. B. 287.

(*h*) *Salk*. 696 ; *Holt*, 40.

(*i*) Deer-stealing in enclosed land is
now a felony ; and in uninclosed land
also, after a previous conviction for the
like offence. *Vide* 24 & 25 Vic. c. 96,
ss. 12 & 13.

(*k*) *Clarke v. Gilbert*, Hob. 331.

(*l*) *Slowman v. Dutton*, 10 Bing. 403.

It has been held, by the Court of Queen's Bench in Ireland, CHAPTER II.
 that words imputing an offence against the Fishery Acts are Offence against the Fishery Acts.
 not actionable *per se*, the offence not being punishable by corporal punishment, but only by fine and forfeiture of the nets or instruments used (m).

In an action for the words, "Thou hast stole our bees Of stealing things *feræ naturæ*." (innuendo a stock of bees), and thou art a thief," after verdict for the plaintiff, it was moved in arrest of judgment that felony cannot be committed of bees, because they are *feræ naturæ*. But the court held, that the subsequent words, "Thou art a thief," showed that the stealing was of such bees of which felony might be committed, and therefore actionable (n).

It may be inferred generally from the authorities that, General rule, and result of authorities.
 where the words contain an express imputation of any crime or misdemeanour for which corporal punishment may be inflicted, they are actionable without proof of special damage. But where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it: even though in default of payment, imprisonment should be prescribed by the statute; imprisonment not being the primary and immediate punishment for the offence (o).

Where the imputation contains a *direct charge* of crime in Slander, actionable imputations.
 precise terms, little difficulty can occur in the application of the rule. In most instances, however, an unpremeditated use of words of doubtful meaning, or an intentional selection of them, for the purpose of impunity, have occasioned much perplexity and litigation. In a great proportion of cases, the question has been, not whether a charge of a specific offence is actionable? but whether, in fact, any offence has been charged by the words? The rule of law requires, that, to ground an action, "words imputing crime must be precise"; but it is by no means essential, that they shall carry on the face of them an open and direct imputation. Such a rule, it is clear, would afford no security against calumny, which may be as effectually conveyed in artful allusions to collateral matter, and oblique insinuations, as by the most explicit assertions. It is, however, incumbent upon the party who complains that he has suffered from an imputation of crime, to show with certainty, the injurious nature of the

(m) *M' Cabe v. Foot*, 11 Ir. Jur. (N.S.) 287; 15 L. T. (N. S.) 115.

(n) 3 Salk. 325.

(o) *Ogden v. Turner*, 6 Mod. 104; 2 Salk. 696; Holt, 40.

CHAPTER II. communication. In order to establish this point, two circumstances are necessary:—1st. That the words used should either of themselves, or by reference to circumstances, be capable of the offensive meaning attributed to them. 2ndly. That the defendant did, in fact, use them in that sense.

The capability of the words to bear a particular construction, must, it is evident, appear upon the plaintiff's Statement of claim; for otherwise it would not be judicially shown that he was entitled to recover. That the defendant did, in fact, use them in that sense, is a matter of evidence to be decided upon the trial. If it appear from the words themselves, or from circumstances, that they are capable of conveying the particular meaning attributed to them by the plaintiff, it will, after verdict for the plaintiff, be taken for granted, that the words were, in fact, used to convey such meaning; for that is a matter upon which the jury alone can decide, and which they must be convinced of before they can give their verdict for the plaintiff. Any objection, therefore, to the words as stated upon the record, is grounded upon the supposition that it does not sufficiently appear that they are *capable* of an actionable meaning.

Ambiguous imputations.

It will be proper, therefore, next to consider the different kinds of ambiguities which may arise, not only in the particular case where some crime has been charged, and where doubt most frequently occurs, but with relation to cases of slander and libel in general, which are governed by the same rules of construction. Words may be divided into three classes:—

1st. Those which bear an obvious and precise meaning on the face of them; as if A. said to B., "You murdered C."

2ndly. Those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning; as if A. say to B., "You were the death of C."

3rdly. Those which are *primâ facie* and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstance; as if A. say to B., "You did not murder C.!" which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation.

Rule of law as to words of ambiguous meaning.

With respect to ambiguities arising out of the second and third classes, it is now the settled rule of law, that both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the whole circumstances of the case. That it is

the province of the jury, where such doubts arise, to decide, whether the words were used maliciously, and with a view to defame; such being matter of fact to be collected from all concomitant circumstances; and for the court to determine, whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. CHAPTER II.

It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words; and before the favourite doctrine of construing words in their *mildest sense*, in direct opposition to the finding of the jury, was finally abandoned by the courts.

The following may be adduced in support of the more rational doctrine which now prevails:—In *Ceely v. Hoskins*, in error (*p*), the words were, “Thou art forsworn in a court of record, and that I will prove!” It was contended, after verdict for the plaintiff, that the action would not lie, because the defendant did not say in what court of record the plaintiff was forsworn, nor that he was forsworn in giving any evidence to the jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: But (per Croke) “Jones, Berkeley, and myself, held clearly that the action well lay, and that such foreign intendment shall not be conceived, and it shall be taken that he spake these words maliciously, accusing him of perjury; and for a false oath taken judicially, upon judicial proceedings in a court of record.” In *Baal v. Baggerley*, the words were, “Thou hast forged a privy seal, and a commission! Why dost thou not break open thy commission?” (*q*). After verdict for the plaintiff it was contended for the defendant, that the words were not actionable; for it did not say the king’s privy seal, nor any writ under the privy seal; also he said not what commission; and the words subsequent, “thy commission,” showed that he meant a commission made by the plaintiff himself: but the judges, having taken time to consider (Berkeley doubting) afterwards delivered their opinions—“That the action well lies; for the words were spoken maliciously; and being alleged in the declaration, that he spake them to scandalize him, for forging of the privy seal and commission; and being found guilty, it shall be intended according to the vulgar interpretation, to mean the king’s privy seal, the counterfeiting whereof is treason; and a commission shall be

Cases in illustration of words of ambiguous meaning.

(*p*) Cro. Car. 509.

(*q*) Cro. Car. 326

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intended the king's commission, under the privy seal;" and Berkeley agreed with the others. In *Somers v. House*, the words were, "You are a rogue, and broke open a house at Oxford: and your grandfather was forced to bring over £80 to make up the breach!" (r). After verdict for the plaintiff, it was moved in arrest of judgment; because, *rogue* is not actionable; and *breaking open the house* but a trespass; and *making up the breach* might be repairing; but the court seemed contrary: for, upon all the words together, a man who heard them could not intend other than a felonious breaking of the house; and though in the old books the rule was, to take the words in *mitiori sensu*, yet per Holt, C.J., they would take the words in a common sense, according to the vulgar intendment of the bystanders. In *Baker v. Pierce*, the words were, "Baker stole my box-wood, and I will prove it!" (s). After verdict for the plaintiff, it was moved, in arrest of judgment, that these words are not actionable; for they shall be taken to mean wood growing, or the like, whereof only a trespass can be committed. That to say, you are a thief, and have stolen my timber, or my apples, or my hops, is not actionable; for where words import either a felony or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worst sense: as to say, he stole my timber out of my yard, or my hops in a bag; and *Mason v. Thompson* (t) was cited. But Holt, C.J., and the court denied that case to be law, and gave judgment for the plaintiff.

Rule, as to words of double meaning.

Where words are capable of a double meaning, the court, after verdict, will always construe them in that sense which may support the verdict. In *Button v. Heyward and wife* (u), the words spoken by the wife were, "George Button (the plaintiff) is the man who killed my husband!" her first husband being dead. After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable for the uncertainty of the word *killing*; for it might be justifiable, or in his own defence, or *per infortunium*, and shall not be presumed felonious, and so made actionable by intendment: for it is a maxim, that words shall be taken in *mitiori sensu*. But it was said by Pratt, C.J., "There can be no question but at this day these words are actionable. In former

(r) Holt, 39.

(t) Hutt. 38.

(s) Lord Ray. 959; 6 Mod. 234;
Holt, 654.

(u) 8 Mod. 24.

times, words were construed in *mitiori sensu*, to avoid vexatious actions, which were then too frequent; but now, *distinguenda sunt tempora*: and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent. We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them in *mitiori sensu*; but we will never make any exposition against the plain natural import of the words. The word *killing* signifies a voluntary and unlawful killing, and is actionable. There are a great number of odd cases in the books." And by Eyre, J., "the words are to be taken in *their worst sense*, for a malicious and felonious killing." And by Fortescue, J., "The maxim for expounding words in *mitiori sensu*, has for a great while been exploded, near fifty or sixty years" (x).

It was observed by Lord Mansfield, C.J., in *Rex v. Horne*, "It is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety, according to their obvious meaning, and as everybody else who reads must understand them; but the defendant may give evidence to show they were used on the occasion in question in a different or qualified sense. If no such evidence be given, the natural interpretation of the words, and the obvious meaning to every man's understanding, must prevail (y). It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and defend himself in another; such a doctrine would indeed be pregnant with the *nimia subtilitas* which my Lord Coke so justly reprobates." In the case of *Peake and Oldham* (z), Lord Mansfield said, "After verdict, shall the court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not! Where it is clear that words are defectively laid, a verdict will not cure them; but where, from their general import, they appear to have been spoken with a view to defame the party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them. I am furnished with a case, founded in strong sense and reason, in support of this

The natural interpretation of words, and their obvious meaning must prevail.

(x) This was said in H. T. 8 Geo. I.

(z) Cowp. 277.

(y) 2 Cowp. 672.

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opinion. The name of it is *Ward v. Reynolds*, Pasch. 12 Ann. B. R., and it is as follows:—The defendant said to the plaintiff, ‘I know you very well! How did your husband die?’ The plaintiff answered, ‘As you may, if it please God!’ The defendant replied, ‘No; he died of a wound you gave him!’ On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment, the court held that the words were actionable, because, from the whole frame of them, they were spoken by way of imputation; and Parker, C.J., said, ‘It is very odd, that after a verdict, a court of justice should be trying whether there may not be a possible case in which words spoken by way of scandal might not be innocently said; whereas, if that were in truth the case, the defendant might have demurred, or the verdict would have been otherwise.’ So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and have found that the defendant meant a charge of murder.” This ruling was adopted in a subsequent case, where it was held, that, to impute that a person murdered his wife by administering improper medicines to her is actionable, and any doubtful interpretation of the words is cured by the verdict of the jury (a).

Where the words impute, that a reputed married woman is the wife of another man, it is for the jury to say whether the defendant does not mean by such imputation that she has committed the crime of bigamy (b).

Modern rules
of construc-
tion, as to
words of
doubtful
meaning.

In an action for words, whether written or spoken, the ordinary sense of those words will be understood to be the meaning of the utterer, unless they are explained to import something different to their obvious meaning, by previous occurrences, conversations, or other matters having been introduced (c).

The question is not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them (d). In *The King v. Watson and others*, Buller, J., observed “Upon occasions of this sort, I have never adopted any other rule than that frequently stated by Lord Mansfield to juries, desiring them to read the

(a) *Ford v. Primrose*, 5 Dowl. & Ry. 287.

(b) *Heming and wife v. Power*, 10 M. & W. 564; and see *Delany v. Jones*, 4 Esp. 191.

(c) *Daines and another v. Hartley*, 3 Ex. 200; 18 L. J. Ex. 81.

(d) Per Denman, L.C.J., in *Read v. Ambbridge*, 6 C. & P. 308.

paper stated to be a libel, as men of common understanding, and say, whether, in their minds, it conveys the sense imputed" (e). In *Roberts v. Camden* (f), which was an action for words alleged by the plaintiff to contain an imputation of perjury; after verdict for the plaintiff, on a motion in arrest of judgment, on the ground that the words did not impute the crime with sufficient certainty, Lord Ellenborough, C.J., in delivering judgment, observed, "The question simply is—Whether the words amount to such a charge? that is, whether they are calculated to convey to the mind of an ordinary hearer an imputation on the plaintiff of the crime of perjury. The rule which at one time prevailed, that the words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by Courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them."

If a man, *in jest*, conveys an imputation of a crime against another, he does so at his peril. It is no defence that he spoke the words *jocularly*. The defendant said of the plaintiff, "he was detected in taking dead bodies out of the church-yard. He was in confinement and fined £20 for stealing and sending dead bodies to England:" the judge directed the jury that if they believed the words to have been spoken *jocularly* they should find for the defendant: *aliter* if spoken maliciously. Held, a wrong direction. The charge being ambiguous, it was a question for the jury whether the words, as used, did not convey to the minds of the hearers an imputation on the plaintiff of the crime of body-snatching (g).

Where an imputation of crime is said to have been spoken *in jest*.

And in subsequent cases it has been held, that words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to, might form a different judgment on the subject. And it is for the Court to construe the sense of all ordinary English words: but where the words used do not necessarily imply the commission of any indictable offence punishable by law; or where they are of a cant or slang character, it is a question of fact for the jury whether or not they have acquired by use a meaning which imputes an indictable offence (h). And if

What are questions for the Judge, and what for the Jury.

(e) 2 T. R. 206.

(f) 9 East, 96.

(g) *Donoghue v. Hayes*, Hayes Ir. Ex. R. 265.

(h) *Hankinson v. Bilby*, 16 M. & W.

445; *Barnett v. Allen*, 3 H. & N. 376;

27 L. J. Ex. 412.

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the words complained of have two meanings, one imputing suspicion, and the other actual guilt, the question in which sense the words were used is for the jury; but a witness to whom the words were addressed cannot be asked in what sense he understood them (i).

Result of authorities as to the construction of words of double import.

From these cases, containing the opinions of some of the most enlightened judges of their own or any times, it may be collected—1st. That where words are capable of two constructions, in what sense they were meant is a matter of fact to be decided by the jury. 2ndly. That the jury are to be guided in forming their opinion by the impression which the words or signs used were calculated to make on the minds of those who heard them, as collected from the whole of the circumstances. 3rdly. That such words will, after a verdict for the plaintiff, be considered by the Courts to have been used in an actionable sense.

As to the degree of certainty requisite to render the charge actionable.

The charge, to be actionable, must in general, as already stated, impute to the *plaintiff* an act of a *criminal* or indictable nature.

It must therefore appear,—

I. That some *act* was imputed by the defendant.

II. That such act is of a *criminal* or *indictable* nature, and

III. That it was meant to be imputed to the *plaintiff*.

I. *That some act was imputed by the defendant.*—Where the terms of the communication are indirect, it may be laid down as a general rule that, wherever words are used, calculated to impress upon the minds of the hearers a suspicion of the plaintiff's having committed an indictable offence, such an inference may and ought to be drawn, whatever form of expression may have been adopted.

Meaning of defendant a question for the jury.

It seems to be properly a question for the jury, whether the defendant, though he used words of suspicion only, did not mean, in effect, to impute the substantive offence to the plaintiff. In the case of *Tempest v. Chambers* (k), it appeared that the defendant, having obtained a warrant for the apprehension of the plaintiff (which had been improperly issued upon an information before the magistrate of facts which amounted to no more than a mere trespass), on meeting Salmon, an agent of the plaintiff's, said, "I have got a warrant for Tempest, I will advertise a reward of twenty guineas to apprehend him; I shall transport him for felony." Lord

(i) *Simmons v. Mitchell*, 6 App. Cas. 156; 50 L. J. P. C. C. 11. (k) 1 Starkie's C. 67.

Ellenborough, C.J., left it to the jury to say whether the defendant was speaking with reference to the warrant which had been improperly issued, or whether he meant substantively to impute a charge of felony.

A distinction is to be taken between an imputation which conveys an absolute charge of Felony, and one which implies a mere suspicion of Felony. The defendant said—"I have a suspicion that you and B. have robbed my house; and therefore I take you into custody;" it was held, that the plaintiff was not entitled to a verdict unless the jury found that the words spoken imputed a *direct charge* of Felony, as distinguished from a mere *suspicion* (l). Distinction between an absolute charge of felony, and one of mere suspicion.

Where the words complained of were—"Have you not heard that Charles Simmons is suspected of having murdered one V., his brother-in-law? A proclamation offering a reward for the apprehension of the murderer is now in my office, and there is only one link wanting to complete the case." At the trial the learned judge having offered the plaintiff a nonsuit, which was declined, directed the jury to find a verdict for the defendant, on the ground that the words were not actionable, being words of suspicion only. It was held, that taken in their natural sense, and without a forced or strained construction, the words meant that there was a case of strong suspicion against the plaintiff, but of suspicion only; and that, therefore, the court could not say that the learned judge was wrong in withdrawing the case from the jury (m).

Where a verdict and damages had been recovered in an action of slander for the words following—"I will take him to Bow Street upon a charge of Forgery" (innuendo that the plaintiff had been and was guilty of Forgery). Upon error assigned, that the words did not import any express or precise imputation of the plaintiff having committed forgery, but merely a suspicion, the judgment was reversed. But the case was not argued, as no one appeared for the plaintiff (n).

From words of interrogation (o). As where the defendant said, "When wilt thou bring home the nine sheep thou stolest from J. N.?" (p) So an action lies for saying, "Did you hear Words of interrogation, conveying imputation of crime.

(l) *Tozer v. Mashford*, 6 Ex. 539; general, see Mo. 418, pl. 573; 2 Rol. 20 L. J. Ex. 225. Rep. 165; Palm. 66; 12 Rep. 134;

(m) *Simmons v. Mitchell*, 6 App. Cro. J. 422; Keb. 359, pl. 52; *Jones v. Littler*, *infra*, 39.

(n) *Harrison v. King*, 4 Price, 46. (p) *Hunt v. Thimblethorpe*, Mo.

(o) For words of interrogation in 414; 1 Vin. Ab. 429.

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that J. S. is guilty of treason?" (q) A. the wife of B. was asked by C., "Wherefore will your husband hang J. S.?" She answered, "For breaking our house in the night, and stealing our goods." The words were held to be actionable, for though they were spoken in answer to a question, they amount to a charge of stealing goods (r).

Alternative words.

The defendant said, "She had a child, and either she or somebody else made away with it!" And three Judges, against the opinion of Bridgman, C.J., adjudged, that the words were not actionable (s). But in a subsequent case this decision was overruled (t).

Inferential words, generally.

And next, the imputation of an act may be inferred from any statement, which virtually includes or assumes the commission of the principal act, or a strong suspicion of it. As where the defendant said, "He is under a charge of prosecution for perjury; G. W. had the Attorney-General's instructions to prosecute." It was held that the words were actionable, as being calculated to convey the imputation of perjury (u). And so also where the defendant said of the plaintiff, "His character is infamous: he would be disgraceful to any society. Whoever proposed him must have intended it as an insult; I will pursue him and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge; but it was a male child of nine years old who complained to me" (x). So where the defendant said, "I dealt not so unkindly with you, when you stole my sack of corn" (y).

Charge of crime conveyed by words of repugnancy.

Where the act charged is, in legal strictness, impossible. Where a criminal charge is conveyed by the defendant's expressions, the liability to make reparation cannot be affected by any impropriety in the terms of the communication, whether legal or grammatical; for the loss of character, and its probable consequences, constitute the ground of action, without reference to the means employed. The contrary doctrine, indeed, at one time prevailed; for it appears to have been held, that if a married woman say, "You have stolen *my* goods," the words,

(q) *Earl of Northampton's case*, 12 Rep. 134.

(r) *Hayward v. Naylor*, 1 Rol. Abr. 50; and see *Simmons v. Mitchell*, *supra*.

(s) *Cart*, 55, 56; and see *Stirley v. Hill*, Cro. Car. 283.

(t) *Harrison v. Thornborough*, 10 Mod. 196.

(u) *Roberts v. Camden*, 9 East, 93.

(x) *Woolnoth v. Meadows*, 5 East, 463.

(y) *Cooper v. Hawkswell*, 2 Mod. 58.

being repugnant, are not actionable; for as a married woman cannot have goods of her own, she cannot be robbed of any (z). CHAPTER II.

The rule, however, seems to be now established, that no inconsistency or grammatical impropriety will prevent the words from being actionable, where the intention to charge the plaintiff with the commission of an indictable offence plainly appears.

II. The *criminal quality* of the matter charged must appear with certainty. This may appear—1st. From the use of general terms of known legal import. 2ndly. From circumstances explaining the meaning of terms otherwise doubtful, or innocent. 3rdly. From the mere description of the circumstances constituting the offence. The Criminal quality of the words must be shown.

The words to be actionable must contain an express imputation of some crime or misdemeanour, and the charge upon the person spoken of must be precise (a).

To charge another with a crime of which he cannot by any possibility be guilty, as having murdered a person who is then living, has been held not actionable because, it is said, the plaintiff cannot be in any jeopardy from such charge (b). Words charging another with the murder of a person yet alive.

But surely such is not the true principle; because, although the person whom the plaintiff is accused of murdering, may afterwards be found to be living, yet the plaintiff suffers in loss of reputation, and is in danger of being apprehended, committed and indicted. The words, if actionable without special damage, must be so immediately when spoken; and their actionable quality must then depend upon the fact, whether the hearers were aware that the person alleged to be murdered was really alive; if they did not know the fact, then all the consequences (the probability of which renders a charge of murder in any case actionable) may follow.

And accordingly, the rule seems now to be established that an action is maintainable for a general imputation conveyed in apt terms. And, therefore, where words in their plain and obvious meaning, without the aid of any innuendo, import a charge of an indictable offence, they are actionable. Rule as to criminal quality of the imputation.

And so, where the defendant, speaking of the death of one Daniel Dolly, said to the plaintiff, "You are a bad man, and I Words 'guilty of the death' of a person, imply

(z) 1 Rol. Ab. 74; 7 Bac. Ab. 296; see *Talbot v. Case*, Cro. Eliz. 569, 1 Vin. Abr. 509; *Brown v. St. John*, guilty. 1 Rol. Abr. 71, 3 Leon. 231, 6 Mod. 200; *Jacob v. Mills*, 1 Vent. 117, Cro. Jac. 331.

(a) *Onslow v. Horne*, 3 Wils. 187.

(b) *Snag v. Gee*, 4 Rep. 16 a; but

CHAPTER II. am thoroughly convinced that you are guilty ; and rather than you should want a hangman, I would be your executioner" (c). After verdict and judgment for the plaintiff, the defendant brought a writ of error in the Court of King's Bench, assigning as two grounds of error—1st. That the words were not in themselves scandalous. 2ndly. That they did not become so by reference to the death of D. D. Lord Mansfield, C.J., in affirming the judgment, observed, "It is argued that there are many innocent ways by which one man may occasion the death of another ; therefore the words, 'guilty of the death,' do not in themselves necessarily import a charge of murder ; and, consequently, as no particular act is charged (which in itself amounts to an imputation of a crime) the words are defectively laid. What ! when the defendant tells the plaintiff that he has been *guilty* of the death of a person, is not that a charge and imputation of a very foul and heinous kind ? Saying that such a one is the cause of another's death, as in the case in 2 Buls. 10, 11, is very different ; because a physician may be the cause of a man's death, and very innocently : but the word *guilty* implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here : on the contrary, in order to explain his meaning, he goes on to say, 'and rather than you should be without a hangman, I will hang you.' These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder."

The words, "I think the business ought to have the most rigid inquiry, for he murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," were held to be actionable, as importing at least a charge of manslaughter ; and though the words were doubtful, the doubt would be cured by the finding of a jury, that they were meant in that sense (d).

Words
charging
another with
being liable to
punishment.

To say of another that he has committed an act for which he is liable to transportation, is actionable without colloquium or innuendo (e). Where the slander alleged was—"I will lock you up in Gloucester Gaol next week. I know enough to put you there." The defendant demurred, on the ground that the words were not actionable, as they did not necessarily impute an indictable offence ; but it was held sufficient that a

(c) *Peake v. Oldham*, Cowp. 275.

(e) *Curtis v. Curtis*, 10 Bing. 477.

(d) *Ford v. Primrose*, 5 D. & R. 289.

criminal act was imputed by the words (*f*). It is no defence to an action for imputing a crime to another, and threatening him with a certain punishment, that the person imputing it was mistaken as to the legal effect, or punishment for such a crime (*g*). CHAPTER II.

The *criminal quality* of the act imputed may appear from circumstances explaining the meaning of words otherwise doubtful or innocent. The criminal quality of the charge may appear from circumstances.

An imputation of being *forsworn* is the most common instance of cases falling under this division, and has given rise to a numerous class of decisions; but it seems that the term is not actionable, unless it appear from the accompanying circumstances to have been meant and understood of such a forswearing as would constitute the offence of perjury (*h*). Where reference is made to a particular court, it is incumbent on the plaintiff to show that the perjury could have been committed there (*i*). It is not necessary that the forswearing should be shown to have been intended of a perjury within the statute; perjury being an offence punishable at Common Law (*k*). Perjury.

Words imputing an offence not necessarily a crime are not actionable unless spoken under circumstances which would have made it a crime. For instance, to say of a person that "he has set his own premises on fire," is not actionable unless the house was contiguous to others belonging to or occupied by other persons; or unless the house was insured, and the words were intended to impute that he had set it on fire for the purpose of defrauding the insurers (*l*). Charge of setting his own premises on fire.

A verbal imputation upon a married man, that he had broken open a box belonging to his wife, and robbed her of £75, is not actionable as a slander, inasmuch as it is not an indictable offence for a husband to take his wife's money whilst they are living together, unless the money was so taken within the meaning of the proviso to sect. 12 of the Married Women's Property Act, 1882 (*m*), "when leaving or deserting, or about Against husband of robbing his wife.

(*f*) *Webb v. Bevan*, 11 Q. B. D. 610; 52 L. J. 544, per Pollock & Lopes, JJ.

(*g*) *Francis v. Roose*, 3 M. & W. 191.

(*h*) 4 Rep. 15, 2 Buls. 150; *Holt v. Scholefield*, 6 T. R. 691; *Hall v. Weedon*, 8 D. & R. 140.

(*i*) Cro. Car. 378; *Gurneth v. Derry*, 3 Lev. 166, 4 Co. 17, 7 Bac. Ab. 260, Cro. Eliz. 720, 1 Vin. Abr. 407, pl. 11.

(*k*) 1 Rol. Ab. 49; *Shaw v. Thompson*, Cro. Eliz. 609. But it has been held that an indictment will not lie in respect of a false oath taken before a surrogate. *R. v. Foster*, Russ. & Ry. C. C. R. 459.

(*l*) *Sweetapple v. Jesse*, 5 B. & Ad. 31; *Jacobs v. Schmaltz*, 62 L. T. 121.

(*m*) 45 & 46 Vic. c. 75.

CHAPTER II. to leave or desert his wife." *Sed aliter*, if they are living apart (*n*).

Stealing :
modern con-
struction of
the term.

The term "stealing" takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter. In modern construction and practice little doubt can arise upon such niceties, which appear in former times to have afforded abundant occupation to the courts. If, from the plaintiff's Statement of Claim, it appear, that the charge of stealing could not, from its application, have been meant to impute a felonious stealing: as if, for example, the defendant had said, "You stole an acre of my land;" the statement would be bad upon demurrer. This doctrine is applicable to every other case where doubtful words, or even those apparently innocent, derive a criminal quality, either from context or collateral circumstances (*o*).

Words in
Foreign
language.

With regard to words spoken in a foreign language, the only question is, whether they were understood by the hearers in an actionable sense. If so understood, the mischief is effected, and the cause of action complete (*p*). Where the words are spoken in the Welsh language, but in an English county, it must appear that the hearers understood Welsh; for otherwise the court will not intend that any there understood the Welsh tongue.

Words
charging an
attempt to
commit a
Crime.

As to words charging an *attempt* to commit a crime.—In the case of *Sir Harbert Croft v. Brown* (*q*), Coke, C.J., observed, that, in ancient time, "*voluntas reputabatur pro facto*;" and that if a person lie in wait to kill another, and upon his resisting, wounded but did not kill him, it amounted to a felony at Common Law. And it may be collected from a general view of the authorities, that the charging any attempt to commit a felony is actionable, for such an attempt constitutes an indictable offence (*r*) at Common Law; and now also by statute (*s*).

Words
charging a
solicitation to
commit a
crime.

Where the words charge a *solicitation* to commit a crime.—The defendant said, "Mrs. Margaret Passie sent a letter to my master, and therein willed him to poison his wife." After

(*n*) *Lemon v. Simmons*, 57 L. J. Ex. 412.

Q. B. 260; 36 W. R. 351; and *vide Williams v. Stott*, *supra*, p. 10.

(*o*) See *Walter v. Beaver*, 3 Lev.

166, 2 Jo. 235, Cro. J. 255, 276; also

Broome v. Goaden, 1 C. B. 728; *Bar-*
nett v. Allen, 3 H. & N. 376, 27 L. J.

(*p*) 1 Rol. Ab. 74, Cro. Eliz. 496.

(*q*) 3 Buls. 167.

(*r*) 2 East, 6.

(*s*) See Consol. Criml. Statutes, 24
& 25 Vic. caps. 97 and 100.

judgment for the plaintiff, it was assigned for error, that the words were not actionable; because they did not charge any act done; and that it was not like charging the plaintiff with lying in wait to commit a murder; but all the justices and barons held, that the action would lie (*t*). And in *Lady Cockaine's case* (*u*), a charge of having solicited another to commit a felony, was held to be actionable. So per Grose, J. (*x*), an action lies for charging the plaintiff with having solicited a servant to steal the goods of his master.

Where the description of the circumstances is precise, little doubt can arise. So an accusation by the defendant of the plaintiff of having bought a stolen horse knowing it to be stolen is actionable (*y*).

III. *It must appear that an indictable offence was meant to be imputed to the plaintiff.*

An indictable offence must have been imputed.

The application of the injurious charge to the plaintiff may be collected, generally, from any circumstances which indicate the intention of the defendant so to apply his words, and which induced the hearers to suppose that the plaintiff was the person meant. Thus, if the defendant should say, "I know what I am, and I know what the plaintiff is; I never did such an act" (*z*) (specifying some criminal act), the words would be actionable, provided the hearers understood the offence to have been imputed to the plaintiff by such words.

The application of the slander to the plaintiff may be ascertained by a variety of circumstances; as from his having been the subject of previous conversation (*a*), or from his being described by name, or by any other means which are sufficient to induce the hearers to apply the offensive imputation to the plaintiff (*b*). And where the plaintiff was a justice of the peace, and Receiver of the Court of Wards, and by reason thereof received great sums of money for the king, and was treated with much confidence by the king; and the defendant, speaking concerning him with one Thomas Whorewood, uttered these words, "Mr. Deceiver hath deceived the king" (*c*). After a verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action would lie; that the words

Application of the words to the plaintiff.

(*t*) Cro. Eliz. 747, cited by Williams, J. Buls. 201.

1 Vent. 276.

(*u*) Cro. E. 49.

(*a*) 1 Rol. Ab. 75, 85.

(*x*) 2 East, 20.

(*b*) Cro. J. 557, 7 Bac. Ab. 289.

(*y*) *Briggs's case*, Godb. 157.

(*c*) *Sir Miles Fleetwood v. Curl*, Cro. J. 557.

(*z*) 2 Lev. 150; *Snell v. Webbling*,

CHAPTER II. "Mr. Deceiver" were an ironical allusion and nick-name to his office and place; and that if such crafty evasions should be admitted, it would be a common practice to slander *sans* punishment (d).

Rule. It may therefore be laid down as a general rule, that the application of the words to the plaintiff is a matter to be collected by the jury, from the particular circumstances of each case.

Imputations of infectious disease. It appears that the law allows an action to be maintained, without proof of special damage, in cases where a person is wrongfully charged with having a contagious or an infectious disease.

Action will not lie for imputation in the past tense. The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in the *past tense*; for such an assertion does not represent the plaintiff, at the time of speaking, to be unfit for society, and therefore the substance of the action is wanting (e).

So in a subsequent case, it was held, that words imputing to another that he is *at the present time* afflicted with a disgusting and contagious disease, are actionable in themselves; inasmuch as they import a present unfitness to be admitted into society: the same reason, however, for avoiding the company of one who *has had* a contagious disorder, does not exist. But to say of a person that he *has* the venereal disease is actionable *per se*, and this too, notwithstanding that special damage is laid, the proof of which wholly fails (f).

(d) And see also *I'Anson v. Stuart*, T. R. 473, Str. 1189.

1 T. R. 748; *Stockley v. Clement*, 4 Bing. 162, 12 Moore, 376.

(f) *Bloodworth v. Gray*, 7 M. & Gr. 334.

(e) See *Carlslake v. Mapledoram*, 2

CHAPTER III.

WHERE THE SLANDER AFFECTS A PERSON IN HIS OR
HER OFFICE, PROFESSION, TRADE OR BUSINESS.

<i>General principles; and grounds of the action.</i>	<i>The like of an Alderman of a Borough.</i>
<i>Danger of exclusion from Office, the gist of the action.</i>	<i>Words affecting tradesmen, professional men, and others.</i>
<i>Plaintiff must be in the present enjoyment of the Office, &c.</i>	<i>Verbal imputations on the goods or commodities of traders.</i>
<i>Class of Cases to which the action extends.</i>	<i>Verbal imputations of immorality on persons in office, &c.</i>
<i>Words defamatory of Candidate for Parliament.</i>	<i>Words imputing unchastity to women.</i>
	<i>Verbal imputations of drunkenness, when actionable.</i>

NEXT to imputations of crime, such as if proved would tend to deprive a man of his life, or liberty, may be ranked those which affect him in his office, profession, trade or business. And accordingly, the law gives a substantive right of action in such cases, notwithstanding that the party slandered may be unable to prove any specific loss or damage: and the reason is, that a man might be effectually ruined in his business, by the publication of the slander, before his proof of specific damage could be completed. The rule therefore is, that words are actionable without proof of special damage, which directly tend to the prejudice of a man in his office, profession, trade, or business.

CHAPTER III.
General principles.

Observations upon this class of cases may be divided into—

- I. Those relating to the grounds of the action;
- II. The class of cases to which the action extends; and,
- III. The degree of certainty and precision requisite to render the words actionable.

I. And, first, as to the *grounds of the action*.

Words which affect a person in his office are actionable, whether the office be productive of emolument, or merely honorary or confidential.

Grounds of the action.

Cases in which magistrates and others (whose offices are merely honorary or confidential) have been allowed to recover a pecuniary compensation for words relating to their official character, seem to rest upon more dubious principles than

Offices merely honorary.

CHAPTER III. any other in which a remedy is given without any proof of some specific loss. It has long, however, been fully established, that words are equally actionable whether the office or profession to which they relate be lucrative, honorary, or merely confidential. So that words spoken of Justices of the Peace, Town Councillors, physicians, barristers, and others have been held actionable, although the office be merely honorary or confidential: and as to the latter, although they are not in legal contemplation entitled to demand the payment of fees.

Action lies whether the office be one of profit or not.

Distinction between words imputing want of ability and those imputing want of integrity.

Where the office is simply confidential, a singular distinction has been taken between words imputing want of *ability* in the holder, and those which charge him with a want of *integrity*. It has been held, that to charge a person in such an office with any corruption, or with any ill-design or principles, is actionable; but that to represent him as wholly incompetent, in point of ability, to hold the office, is not a slander for which an action is maintainable. The reason assigned for the distinction is so remarkable, that it may be proper to give it in the very words of Lord Holt, who says (a): "It has been adjudged, that to call a Justice of the Peace, 'blockhead,' 'ass,' &c., is not a slander for which an action lies, because he was not accused of any corruption in his employment, or any ill design, or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honester than he is. If a person be in a place of profit, and he is accused of insufficiency, he shall have remedy by action. 'Tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the government, he shall have an action for such scandal to his reputation."

Words imputing ignorance to a magistrate.

In the case of *Onslow v. Horne*, De Grey, C.J., in giving judgment, observed, "It was objected at the bar, on the side of the defendant, that words spoken of an officer, or magistrate, are not actionable, unless they carry an imputation of a criminal breach of duty. I will not give this my sanction, because I think for imputation of ignorance to one in a profession or office of profit, an action will certainly lie" (b).

(a) *Howe v. Prinn*, Holt, 653, 3 Salk. 694. (b) 3 Wils. 186.

With reference to the case—*Onslow v. Horne*—and also to a case reported in Sir W. Blac. Rep. p. 753—*Bayley, B.*, in a subsequent case, expressed an objection to the rule in both reports, stating that the words ‘probably’ and ‘probable’ were too indefinite; and unless they were considered as equivalent to ‘having a natural tendency to,’ and were confined within the limits of showing the want of some necessary qualification, or some misconduct in the office, it went beyond what the authorities warranted (c).

Wherever the action is for words spoken of the plaintiff with reference to his office, it must be shown that he was in the exercise or enjoyment of such office at the time of the utterance of the slander: for if the words are not actionable in themselves, but only with reference to the plaintiff’s office, he will not be entitled to recover if at the time they were uttered he was out of office, or had ceased to exercise the trade or business with reference to which they were spoken (d).

The plaintiff must be in the present exercise or enjoyment of his office.

And where an action is brought for words spoken of a barrister or physician, it must appear that he practised (e) as such at the time the words were spoken; for otherwise the words could not have affected him professionally.

A doubt has been raised, whether damages are properly recoverable by barristers and physicians for words relating to their professions, since their fees are merely honorary (f); the actual decisions, however, upon the subject, leave no doubt as to their right to recover for such words (g); and if their situations be considered as merely confidential, their right to recover rests upon the same foundation as that of magistrates and others whose offices are of a similar description.

II. As to the class of cases to which the action for slander-in-office extends.

Class of cases to which the action extends.

The action extends to the slander of a person in any lawful trade, profession, business, or other occupation by which he obtains or seeks his livelihood; and to all offices of trust, or profit, without limitation; provided they be of a temporal nature, and not prohibited by law. But the plaintiff cannot recover if the vocation in which he is defamed be an illegal one (h).

(c) *Lumby v. Allday*, 1 C. & J. 305; 231; Poph. 207.

and see *Doyley v. Roberts*, 3 Bing. N. C. 835.

(f) *Broun v. Kennedy*, 33 L. J. Ch. 342.

(d) *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Ex. 294; 23 L. J. Ex. 78.

(g) 3 Wils. 59.

(h) See *Hunt v. Bell*, 1 Bing. 1; *Yrisarri v. Clement*, 3 Bing. 432.

(e) 7 Bac. Ab. 269; *Ib.* 271; Sty.

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Of corruption
in office.

The plaintiff held office under the king, and the defendant said of him (i), "Thou hast received money of the king to buy new saddles, and hast cozened the king, and bought old saddles for the troopers." The words were held to be actionable; and that it was not material what employment the plaintiff held under the king, nor whether it was for life or for years.

Slander of
Parish
Officers.

An action is maintainable for words spoken of a parish officer, as of a churchwarden with reference to his office as such—that he "has cheated the parish of £40" (k). But it is no slander to say of a churchwarden that he stole the bell-ropes of the parish church in which he held office; because an indictment for larceny could not be supported against a churchwarden under such circumstances; he having, by virtue of his office, the possession of the goods of the church (l).

Of other
Officers.

It has been held in old cases, that for saying of the deputy of Clarencieux, king of arms, that he was "a scrivener, and no herald" (m), an action was maintainable. So for words of the master of the mint (n); of a clerk to a public company (o); of a town clerk (p); of a steward of a court baron (q).

Of a Member
of Parliament.

But where the defendant said of a member of parliament, "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow (the plaintiff), we might as well instruct the winds, and should he even promise his assistance, I should not expect him to give it us." After verdict for the plaintiff, judgment was arrested; and it was observed by De Grey, C.J., on that occasion, that the words did not charge the plaintiff with any breach of his duty, his oath, or any crime or misdemeanour whereby he had suffered any temporal loss in fortune, office, or in any way whatever (r).

Of a Candi-
date for
Parliament.

Words which are in themselves actionable, are not the less so from having been applied to a candidate to serve in Parliament (s). And accordingly an action will lie for charging a candidate for the office of member of parliament for a county

(i) Mar. 82; 1 Vin. Ab. 465, pl. 19;
Sir R. Greenfield's case.

(k) Sty. 338; 1 Vin. Ab. 463; Cro.
J. 339; 2 Buls. 218; Cro. E. 358.

(l) *Jackson v. Adams*, 2 Bing. N. C.
402; and *vide Lemon v. Simmons*, 57
L. J. Q. B. 260.

(m) Cro. El. 328.

(n) Leo. 88.

(o) Cro. El. 358.

(p) Hutt. 23.

(q) 1 Rol. Ab. 56.

(r) *Onslow v. Horne*, 3 Wils. 177.

(s) *Harwood v. Sir J. Astley*, 1
B. & P. N. R. 47.

(in the presence of the electors) with evil principles, inclinations, and intentions (*t*). And so also for charging a candidate with blasphemy and atheism, although not in the presence of the plaintiff's electors, but at a public meeting of another constituency (*u*). CHAPTER III.

By a recent statute (the "Corrupt and Illegal Practices Prevention Act, 1895") (*x*)—any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883. But no person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. False statements of a Candidate an "illegal practice."

Words uttered which induced, or contributed to induce, a majority of the members of a London club not to alter certain rules, whereby the plaintiff was prevented from again seeking to be elected a member of the club (he having been previously rejected on a ballot for his election), were held not actionable (*y*). But if false and malicious statements are uttered which actually prevent a candidate from being elected a member of a club, such statements would be actionable, unless spoken on a privileged occasion. Of a candidate for election to a club.

Where the plaintiff had been elected to the office of Town Councillor, and soon after the election, and before he had made the statutory declaration under the Municipal Corporations Act, or entered upon the duties of his office, the defendants spoke and published of him words imputing habitual drunkenness and unfitness for the office of Town Councillor. At the trial no special damage was proved; but the jury were directed that the words were actionable notwithstanding; and the jury having found a verdict for the plaintiff, with separate damages against each defendant, it was held, by the Court of Appeal, that the office of Town Councillor, not being an office of profit, and the imputation not being one of misconduct in office, but of unfitness for office, the action was not maintainable, as the Of a Town Councillor; imputation of unfitness for office.

(*t*) *Prinn v. Howe*, 1 Bro. P. C. 64.

(*x*) 58 & 59 Vic. c. 40, ss. 1 & 2.

(*y*) *Chamberlain v. Boyd*, 11 Q. B. D.

(*u*) *Pankhurst v. Thompson*, 3 Times L. R. 199. 407; 52 L. J. 277.

CHAPTER III. misconduct charged was not such as would justify removal from or deprivation of office (z).

Of an Alderman of a Borough : imputation of misconduct in office.

But where in an action of slander of the plaintiff, an alderman of a borough and chairman of the improvement committee of that borough, imputing dishonesty or malversation in office as such chairman, in negotiating the purchase, by the corporation, of land in which he was interested, at an exorbitant and unfair price; it was held, that the action would lie without proof of special damage, and whether or not there was a power of removal from the office for misconduct of the kind (a).

Of Clergymen.

The action extends to words spoken of clergymen and other ecclesiastical persons (b). But words spoken of a clergyman, as such, are not actionable, unless he holds some benefice or preferment, of which he might be deprived if the words were true. The reason usually given for supporting the action in such a case is, that the imputation would be a cause of deprivation (c). And accordingly it has been held, that no action will lie for a verbal imputation of incontinency in a clergyman, unless he is beneficed, or holds some clerical office or employment of temporal profit (d). But if a clergyman of the Church of England be in the actual receipt of any professional temporal emolument, as preacher, under-lecturer, or even as an occasional reader, and the charge, if true, would be ground of degradation from holy orders or deprivation of office, the imputation would, it seems, in principle, be actionable. Where it was alleged that the plaintiff was chaplain to a peer, and that the defendant falsely said of him, that he had a bastard, whereby he lost the chaplainship; the action was held maintainable, on the express ground that the chaplainship was a temporal preferment (e). So, to say of a minister in office that he is an adulterer and has had two children by the wife of another man, is actionable (f). And so also to charge a beneficed clergyman with immorality and misappropriation of the sacrament money (g).

Slandorous words reflecting upon the plaintiff, a clergyman, in his office, by an imputation that he fraudulently obtained

(z) *Alexander v. Jenkins and another* (1892), 1 Q. B. 797; 61 L. J. 634.

(a) *Booth v. Arnold* (1895), 1 Q. B. 571; 64 L. J. 443.

(b) 3 Lev. 17; 1 Rol. Ab. 58.

(c) 1 Rol. 58; 1. 30.

(d) *Gallwey v. Marshall*, 9 Ex. 294; 23 L. J. Ex. 78.

(e) 1 Lev. 248.

(f) *Parrat v. Carpenter*, 2 Cro. Eliz. 502.

(g) *Highmore v. Earl and Countess of Harrington*, 3 C. B. N. S. 142.

a bill of exchange from the defendant while stupefied with drugged wine, were also held actionable, on motion in arrest of judgment (*h*). CHAPTER III.

But, to say of a Congregational minister, with reference to his former occupations, that he is a rogue, and has been guilty of fraud and cheating; and that the defendant would so expose him that he should "not be able to hold up his head in the pulpit at T. nor in any other:" was held, in the absence of proof of special damage, to be no slander of the plaintiff in his office as such minister (*i*). Of a Congregational Minister.

The action extends to words affecting a person in any particular art or lawful employment, by which he gains his livelihood; as of an artist, sculptor, architect, engineer, schoolmaster, schoolmistress, governess, &c., &c. Artist, Schoolmaster, and others.

Words tending to injure a merchant or tradesman in his business as such are actionable; whether they reflect upon the honesty of his dealings, his credit, or the commodity in which he deals. To say of a corn-factor, "You are a rogue and a swindling rascal, you delivered me 100 bushels of oats, worse by sixpence a bushel than I bargained for," is actionable without proof of special damage (*k*). And so also, an action lies for words imputing to a tradesman that he uses or sells by false weights (*l*), or false measures (*m*); for such words obviously touch him in his trade (*n*). Of a Merchant or Tradesman.

But, where the plaintiff, a butcher, having sold the defendant some meat; defendant afterwards called at the plaintiff's shop, and in the presence of several customers said, "I intended to have dealt with you, but shall not do so, for you changed the lamb that I bought of you for a coarse piece of mutton;" it was held, that the communication, if made *bonâ fide*, was privileged (*o*). And where a medical officer to a public school, in words spoken to the steward (whose duty it was to examine the meat supplied to the school) imputed that the plaintiff, a butcher, who supplied the school with meat, sold bad meat: it was ruled, in the absence of malice, a privileged communication (*p*). Corn-factor.

But where the plaintiff, an auctioneer and appraiser, had been employed by the defendant to value certain goods; the words complained of were, "He is a damned rascal, he has cheated Of selling by false weights.

(*h*) *Pemberton v. Colls*, 10 Q. B. Goldsb. 5.
461; 16 L. J. Q. B. 403.

(*i*) *Hopwood v. Thorn*, 8 C. B. 273;
19 L. J. C. P. 94.

(*k*) *Thomas v. Jackson*, 3 Bing. 104.

(*l*) *Stober v. Green*, 1 Brownlow &

(*m*) *Bray v. Ham*, *Ibid.* p. 4.

(*n*) *Griffiths v. Lewis*, 8 Q. B. 841.

(*o*) *Crisp v. Gill*, 29 L. T. 82.

(*p*) *Humphreys v. Stillwell*, 2 F. &

F. 590, per Williams, J.

CHAPTER III. me out of £100 on the valuation ;" the words were held a slander of the plaintiff in his business (q).

Stock-broker. To say of a stock-broker, "he is a 'lame duck,'" is actionable (r). But a stock-jobber, or outside dealer in the public funds, is not, it appears, considered as a known trader and possessing a character as such (s).

Contractor. To impute to a contractor that he has used "the old materials" about certain work, is slanderous, if pointed by innuendo to the effect that, the plaintiff had been guilty of dishonesty in his trade in using old materials, when his contract was for new (t). But words spoken of a contractor or lessee of tolls (after he has ceased to be such), with reference to his conduct whilst such contractor or lessee, are not actionable as words spoken in the way of trade or business (u).

Of a Game-keeper. To say of a gamekeeper, in a fox-hunting district (who had been engaged on the terms and understanding that he was not to kill foxes), that he had "trapped three foxes in Riddler's wood," is actionable, as an imputation of a breach of duty in his employment as such gamekeeper (x).

A mere casual employment not sufficient to sustain the action. The humility of the employment or occupation is no objection to the action either in law or reason (y). It does not appear to be necessary that the party should gain his living in the character to which the slander is applied ; it is sufficient if he habitually act in that character, and derive emolument from it. The rule, however, does not seem to extend to representations, which affect nothing more than casual instances, in which the plaintiff has assumed such a character.

III. As to the degree of *certainty and precision* requisite to make the words actionable.

The only question arising upon this is—Do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do, they are actionable; the *quantum* of damages being a mere question of fact for the consideration of the jury.

Words that are not actionable in themselves, are not actionable when spoken of any one in office, profession, or trade, unless they *touch him in such office* (z). Words to be actionable

(q) *Bryant v. Lorton*, 11 Moore, 344. 590.

(r) *Morris v. Langdale*, 2 B. & P. 284.

(s) *Ibid.*

(t) *Babonneau v. Farrell*, 15 C. B. 360; 24 L. J. C. P. 9.

(u) *Bellamy v. Burch*, 16 M. & W.

(x) *Foulger v. Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169.

(y) *Vide Seaman v. Bigg*, Cro. Car. 480; *Perry v. Hooper*, 1 Lev. 115.

(z) Com. Dig. Ac. for Defam. D. 27; *Doyley v. Roberts*, 3 Bing. N. C. 835.

as spoken of a man in his office, must be spoken of him in reference to his character or conduct in such office, and must impute to him the want of some qualification for, or misconduct in, his office (a). CHAPTER III.

To impute want of *integrity* to any person who holds an office of trust or profit is actionable: as to say of a judge, that "his sentence was corruptly given" (b). Or of a justice of the peace, "I have often been with him for justice, but could never get anything at his hands but injustice" (c). Or, "He covereth and hideth felonies, and is not worthy to be a justice of the peace" (d). Words imputing want of integrity.

Where a person holds an office or situation, in which great trust and confidence are of necessity reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation (e). So, where the defendant said to the plaintiff, who was one of the attorneys or clerks of the Queen's Bench, and sworn to deal duly without corruption in his office, "You are well known to be a corrupt man, and to deal corruptly." Upon giving judgment for the plaintiff, it was said, *quod sermo, relatus ad personam, intelligi debet de conditione personæ* (f). Persons in offices of great trust and confidence:

An attorney brought an action for the words, "I have taken out a judge's warrant to tax Phillips's (the plaintiff's) bill, I'll bring him to book, and shall have him struck off the roll." Lord Kenyon, C.J., ruled, at nisi prius, that the words were not actionable; and added,—had the words been, "He deserves to be struck off the roll," they would have been actionable (g). With respect to this distinction, it may be proper to suggest a doubt, whether the words in the case cited would not in common acceptation convey to the hearer the same meaning as the words which the learned judge is reported to have deemed to be actionable, since they seem as clearly to evince the opinion of the speaker, that the plaintiff deserved to be struck off the roll. Attorneys and Solicitors.

Where the defendant said of an attorney, "he has defrauded his creditors, and has been horsewhipped off the race-course at

(a) *Lumby v. Allday*, 1 Cr. & J. 301.

(b) Cro. Eliz. 305.

(c) Cro. Car. 14.

(d) 4 Rep. 16.

(e) *Howe v. Prinn*, Holt, 652; 2 Mod. 159; *Sir J. Harper v. Beau-*

mond, Cro. Jac. 56; 4 Rep. 16; Cro. Car. 192; and see *Day v. Buller*, 3 Wils. 59.

(f) 4 Rep. 16; Cro. Jac. 586.

(g) *Phillips v. Jansen*, 2 Esp. 624.

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D——;” it was held to be a question of fact for the jury, whether or not the words complained of were spoken of the plaintiff in his professional character: and the jury having found that the words were not spoken with reference to the plaintiff’s profession, but that they had a “tendency to injure him morally and professionally;” and the jury having also negatived the allegation of special damage; it was held, that upon such findings, the words were not actionable (*h*). Unless the words complained of are reasonably capable of an imputation impugning the capacity or conduct of the plaintiff in his profession of a solicitor, they are not actionable, in the absence of proof of special damage (*i*).

Of Tradesmen

Words imputing dishonesty to a tradesman are not actionable, unless they be spoken with reference to his trade (*k*). So that to call a tradesman a cheat, generally, has been held not to be actionable (*l*). But otherwise to say, “He keeps false books” (*m*); for the words evidently relate to his course of trading. So to call a tradesman a rogue (*n*), or a cheat, with reference to his trade, is actionable. But to say generally of such a person, “Thou hast no more than what thou hast got by cozening and cheating,” has been held not actionable (*o*). It may, however, be doubted, whether there is any solid distinction between these cases, since every tradesman’s livelihood depends in some measure upon his general character for honesty and integrity; and it is difficult to suppose, that a general imputation of dishonesty, if believed, would not operate to his prejudice.

The degree of trust or confidence sometimes an important element.

It seems that some degree of trust and confidence must be reposed in the plaintiff, in order to render words reflecting upon his character for integrity actionable. Thus the words of a carpenter, “He has charged Mr. Andrews for forty days’ work, and received the money for the work, that might have been done in ten days, and he is a great rogue for his pains,” were, after verdict, held, not actionable (*p*). The distinction seems to be this: Where great confidence must necessarily be reposed, as in a solicitor, or a superintendent, words reflecting generally upon his character are actionable; but where mere ordinary confidence is reposed, in the common course of honest

(*h*) *Doyley v. Roberts*, 3 Bing, N. C. 835, 840; 5 Scott, 40.

(*i*) *Dawncey v. Holloway*, C. A. (1901), 2 K. B. 441.

(*k*) *Sibley v. Tomlins*, 4 Tyrw. 90.

(*l*) 3 Salk. 326.

(*m*) Holt, R. 39.

(*n*) Burr. 1688.

(*o*) 12 Mod. 307.

(*p*) *Lancaster v. French*, Str. 797.

dealing, as that a tradesman shall charge a fair price for his goods, or an artificer, surveyor, or mechanic for his labour, the law holds that the words are not so injurious as to bear an action unless they are applied to the plaintiff's trade or business with certainty and precision. CHAPTER III.

Where the office, profession, or employment of the plaintiff requires great talent and high mental attainments, general words imputing want of ability, are actionable without express reference to his particular character, for it necessarily includes an ability to discharge the duties of such a situation; but where the employment is of a mere mechanical nature, the words to be actionable must be applied to it clearly and unequivocally. Thus, to say of a barrister generally, that he is a "dunce," has been held to be actionable; the word dunce being commonly taken to mean a person of dull capacity who is not fit to be a lawyer (*q*). Distinction as to offices of talent and high attainments and those of mere mechanical employment.
Of a Barrister.

So, to say of a physician, that he is "no scholar," is actionable; a learned education being considered to be an essential qualification in the medical profession (*r*). But it is no slander to say of a person who is unlawfully practising in England as a physician, that he is a quack, or an impostor, or an unqualified person (*s*). Of a Physician.

The words must, however, in general, be spoken with reference to the particular situation of the plaintiff; in which case they are actionable if they impute any want of knowledge, skill, or diligence, in the exercise of his profession: as to say of a surgeon and accoucheur, "I wonder you had him to attend you: several have died that he (the plaintiff) had attended, and there have been inquests held on them;" the words were held actionable without the aid of an innuendo; for their plain and obvious meaning imputed to the plaintiff a want of proper qualification for his profession of surgeon and accoucheur; and, that he was so deficient in skill or care, as that he had either caused his patients to die, or at least that coroner's inquests had been held, in which the inquiry was, whether he had not been the cause of the death of many persons (*t*). So also, it appears, the words, "He is a bad character. None of the medical men here will meet him," are actionable as imputing the want of a necessary qualification for a surgeon in the ordinary discharge of his professional Surgeon and accoucheur.

(*q*) *Peard v. Johns*, Cro. Car. 382; Cro. Car. 720.
and see 2 Vent. 28.

(*s*) *Collins v. Carnegie*, 1 A. & E. 695.

(*r*) 7 Bac. Ab. 269; 1 Roll. Ab. 54;

(*t*) *Southee v. Denny*, 1 Ex. 196.

CHAPTER III. duties (*u*). And the action extends to all medical practitioners (*x*): as to say of an apothecary, "It is a world of blood he has to answer for in this town: through his ignorance he did kill a woman and two children at Southampton; he did kill J. P. at Petersfield; he was the death of J. P.; he has killed his patient with physic" (*y*). So also to impute to an apothecary that, by administering improper medicines, he killed a child (*z*). So where the defendant said of a midwife (*a*), "Many have perished for her want of skill."

Words affecting the credit of Merchants and Traders. The law has shown great tenderness in protecting merchants and traders against imputations upon their *credit*; which, if believed, must necessarily operate to their serious prejudice. Formerly (*b*), indeed, it was held that the words, to support an action, must import bankruptcy (*c*): this doctrine has, however, long been abandoned. The law now is, that, whatever words have a tendency to hurt, or are calculated to prejudice, a man in any trade or business by which he seeks his livelihood, are actionable (*d*). And so where the plaintiff, being a laceman, declared in case for these words—"You are a rascal, you are a pitiful, sorry rascal; you are next door to breaking;" and, being laid to have been spoken of the plaintiff in his trade, they were held actionable, without any averment of special damage (*e*). Saying of an innkeeper, "He is a bankrupt; he will be in the Gazette in a twelvemonth; he is a pauper," was held actionable, though, at that time, an innkeeper was not liable to the bankrupt laws (*f*). For a man may be as much prejudiced by such words as if he were actually subject to the bankrupt laws. Any words which in common acceptation, imply want of credit are sufficient; as to say of a tailor (*g*), "I heard you were run away." But it was held, that to say of a tradesman, "You are a regular prover under bankruptcy, you are a regular bankrupt-maker, if it was not for some of your neighbours your shop would look queer," was no slander, as the words contained no imputation on the plaintiff in the way of his trade (*h*).

- (*u*) *Southee v. Denny*, 1 Ex. 202.
 (*x*) *Smith v. Taylor*, 1 B. & P. N. R. 196.
 (*y*) *Tutty v. Alewin*, 11 Mod. 221.
 (*z*) *Edsall v. Russell*, 4 M. & Gr. 1090.
 (*a*) *Flower's case*, Cro. Car. 211.
 (*b*) Holt, 39.
 (*c*) Cro. Jac. 345.
 (*d*) *Whittaker v. Bradley*, 7 D. & Ry. 649.
 (*e*) *Read v. Hudson*, 1 Ld. Ray. 610; *Southam v. Allen*, Sir T. Ray. 231.
 (*f*) *Whittington v. Gladwin*, 5 B. & C. 180; *Whittaker v. Bradley*, *supra*.
 (*g*) *Davis v. Lewis*, 7 T. R. 17.
 (*h*) *Angle v. Alexander*, 7 Bing. 122; 1 C. & J. 143.

To impute indigent circumstances to a banker is also actionable either with or without proof of special damage (i). An imputation of bad financial circumstances may be conveyed by the refusal of a banker to honour a cheque; and if a banker, having sufficient funds in hand belonging to a customer, dishonour his cheque, the banker will be liable to an action for damages (k).

CHAPTER III.

Imputing indigent circumstances to a Banker.

An alien, residing and carrying on business in England, may maintain an action of slander or libel: as in a case where the defendant said of a merchant alien, that he was bankrupt; for by law an alien may have personal actions; and the imputation tends to impair the plaintiff's credit in his trade (l). And though resident abroad, he may sue here for defamation published of him in England (m).

Bankruptcy to an alien merchant.

To say of a trader, "You are a sorry pitiful fellow and a rogue, and compounded your debts for 5s. in the pound," is actionable (n). So of a tradesman, "He is indebted to me in a considerable amount, and if he does not come and make terms with me, I will make a bankrupt of him and ruin him" (o). So also where defendant said, "I will bet £5 to £1 that Mr. J. (the plaintiff) was in a sponging house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Whereupon, in reply to a bystander, "Do you mean to say that J. the Brewer, of R., has been in a sponging house within the last fortnight for debt?" the defendant said—"Yes, I do." The words were held a slander spoken of the plaintiff in the way of his trade; as it was plain, from the conversation, that they were spoken of him in his character of a brewer (p).

Various imputations of insolvency upon Traders.

If words imputing insolvency in trade, are spoken of one of the Partners in a Firm, such individual partner may maintain an action for Slander and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained (q).

Partners in trade.

To publish of a trader, without lawful justification or excuse, any statement the natural consequence of which would be to

Words of a Trader, general rule as to.

(i) *Robinson v. Marchant*, 7 Q. B. 90; 8 Scott, 180.

(k) *Rolin and another v. Steward*, 14 C. B. 595. (n) 2 Ld. Raym. 1480; Str. 762.

(l) *Tuerlote v. Morison*, Yelv. 198; 22 L. J. C. P. 151. (p) *Jones v. Littler*, 7 M. & W. 423.

Bulst. 134. (q) *Harrison v. Berington*, 8 Car. & P. 708, per Lord Abinger, C.B.

(m) *Pisani v. Lawson*, 6 Bing. N. C.

CHAPTER III

Verbal imputations of immorality on persons in office, &c.

Distinction between such imputations upon males, and females.

Imputation of immorality to a Physician ;

prevent customers dealing with him, is actionable, if followed by a general loss of custom in consequence of such publication (r).

In actions of slander in which no indictable offence is imputed, but merely an *immoral* one, until recently (1891) (s) such actions were not maintainable except on proof of special damage; or unless the words were actually spoken of the plaintiff with reference to his or her office, profession, or employment, and even in those cases it was necessary to show how, and in what manner, the imputation was connected by the speaker with such office or employment.

It has, however, always been considered that there is a wide distinction between imputations of immorality upon a man, and in such upon a woman. In the former, immorality, unless very gross, would seldom be a disqualification either for office or business; except perhaps in such as clergymen, and ministers of religion, and in some cases of medical practitioners, and officers of charitable and other institutions. But in the case of the other sex, there are few occupations in which immorality would not be an absolute disqualification and cause of dismissal; as, for instance, in the case of a domestic servant, a governess, and such like. Chastity being usually an essential qualification in such occupations, a mistress on discovering that her servant, or governess, is unchaste, would be justified in dismissing her; and therefore, in those cases in which chastity is an essential qualification for the service or employment, imputations of the kind have been held actionable (even prior to the statute of 1891) (t) on the ground of their tendency to dismissal from employment (u). The reason formerly given, why a verbal imputation of unchastity was not actionable except on proof of special damage, was, because it was "a spiritual defamation punishable in the spiritual courts" (x). But as the jurisdiction of the ecclesiastical courts in suits for defamation has been abolished (y), the reasons upon which the older decisions rested for refusing relief no longer exist.

In an action by a Physician for words imputing adultery to him, the words were alleged to have been spoken of him "in

(r) *Riding v. Smith*, 1 Ex. D. 91; *infra*, 135.
45 L. J. 281.

(s) *Vide* 54 & 55 Vic. c. 51.

(t) "The Slander of Women Act,"
infra, p. 44.

(u) See *Connors v. Justice and wife*,

(x) See per Holt, C.J., in *Ogden v. Turner*, Holt, R. 40; *Byron v. Emes*, 12 Mod. 106; 8 Will. 3; *Greaves v. Blanchet*, Salk. 695; 6 Mod. 148.

(y) See 18 & 19 Vic. c. 41.

his profession : " no special damage was laid. After verdict for the plaintiff, judgment was arrested, on the ground that such words, alleged merely to be spoken of the plaintiff " in his profession," were not actionable without special damage : and that if spoken so as to convey an imputation upon his conduct in his profession, the declaration ought to show how the speaker connected the imputation with the professional conduct (z). But where immoral conduct was imputed to an assistant-accoucheur in his attendance upon his employer's patients ; whereby he lost his situation, and was unable to obtain admission to the Apothecaries' Company for an examination as to his fitness to practise : a verdict for the plaintiff with substantial damages was upheld (a). And where it was imputed to a surgeon and accoucheur that a female servant had a child by him, and in consequence of the imputation one D. refused to employ him as accoucheur to attend his wife ; it was held, that he was entitled to recover such damages as he had sustained by the slander (b).

to an
Accoucheur ;

In a case in which the plaintiff was clerk to a gas company, and the words complained of were—" You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores. You are not fit to live, and are a disgrace to the situation you hold," &c., it was held, that the words were not actionable (c). And Bayley, B., in delivering the considered judgment of the court said, " The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable ; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk ; that they do not, from their tenor, import that they were spoken with any such reference ; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk." And it was held, that the charge proved was not actionable, because the imputation it contained did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to the plaintiff's conduct as clerk (d). And to say of a Superintendent of

to a Clerk to a
Gas Company ;

to a Super-
intendent of
Police.

(z) *Ayre v. Craven*, 2 A. & E. 7 ; 4 29 L. J. Ex. 125.
Nev. & Man. 220.

(c) *Lumby v. Allday*, 1 Cr. & J. 301 ;

(a) *Martin v. Strong*, 5 A. & E. 535. 1 Tyrw. 217.

(b) *Dixon v. Smith*, 5 H. & N. 451 ; (d) *Ibid.* p. 305.

CHAPTER III. Police, "he has been guilty of conduct unfit for publication," is not actionable unless it be said of him with reference to his office (*e*).

Imputations
of immorality
in a female
domestic
servant ;

But in an action for slander of the plaintiff in her vocation of a domestic servant, the words complained of were—"You are not aware Mrs. C. what kind of a girl you have in your service, for I can assure you she is often out with our married man"; in consequence of which Mrs. C. dismissed the plaintiff from her service: and it was held, that the words were actionable, inasmuch as they were spoken of the plaintiff in her vocation (*f*). And so also, where it was alleged that the defendant spoke and published of the plaintiff, who was a domestic servant, in actual employment as such, the following words, in relation to her employment,—“I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B.’s house, and sent away by her in a car; and she afterwards to give the girl a good discharge!” It was held, by the Court of Common Pleas, in Ireland, on demurrer to the claim, that the words having been spoken of the plaintiff with reference to her character as a domestic servant, were actionable, without any allegation of special damage (*g*).

to a governess ; And where the plaintiff was in service as a governess, and the defendant imputed that she had had a child by her master: in an action for the slander, alleging as special damage, dismissal from her employment; it appeared that the words were spoken by the defendant to the plaintiff’s father, who repeated them to the plaintiff’s employer, and the latter then dismissed her (though he knew the charge to be false), on the ground that “after such a charge it might be injurious to her character to remain, and unpleasant to both”: after verdict for the plaintiff, with damages, it was held that the special damage was the legal and natural consequence of the defendant’s slander, and the verdict was upheld (*h*).

to a Trader :
that “trade
maintained by
prostitution of
a female.”

It has been held, that words spoken of a tradesman imputing to him that his trade is maintained by the prostitution of a female employed by him, are not actionable (although laid to be spoken of him in his trade); unless they can be construed

(*e*) *James v. Brook*, 9 Q. B. 7; 16 L. J. Q. B. 17.

(*f*) *Rumsey v. Webb*, 11 L. J. C. P. (N.S.) 129; Car. & Mar. 104.

(*g*) *Connors v. Justice and wife*

(1862), 13 Ir. C. L. R. 451.

(*h*) *Gillett v. Bullivant*, 7 L. T. (O.S.) 490, per Lord Denman, C.J., and Williams, J.

as imputing that he kept a bawdy house (*i*). But in this case, CHAPTER III
 the jury had found that the words did not convey an imputation on the plaintiff of keeping a bawdy house: and the Court said, that it did not clearly appear that the words related to the plaintiff in his business; and that they could not consider them as used in any other sense than as a general imputation on his moral character (*k*).

Words imputing adultery to a trader's wife, who assisted her husband in his business, were held actionable at the suit of the husband alone (without joining the wife as co-plaintiff), on proof of a general loss of custom (*l*). Words imputing adultery to a Trader's wife.

It thus appears that verbal imputations of immoral and unchaste conduct in females have always been actionable upon proof of *special damage* (*m*); but in the absence of special damage, the imputation, however gross and untrue, was not, until recently, actionable unless spoken of a person in his or her office or employment; such office or employment being one in which morality, or chastity, is an essential qualification; as in the case of a female domestic servant. Words imputing unchastity to women.

The unsatisfactory state of the law in this respect; according to which an imputation *by words*, however groundless, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, was not actionable without proof that it had actually produced special temporal damage to her, has, on several occasions, been the subject of expressions of disapprobation and regret by learned judges in the course of delivering their judgments in cases of the kind (*n*).

But if by reason of verbal imputations of unchastity in a woman, whether married or single, it could be proved that she had suffered any special damage—as the loss of any real or material advantage—the action was supportable; such, for instance, as being deprived of any substantial benefit arising from the hospitality of friends; which was held to be a sufficient temporal damage whereon to maintain the action (*o*). And so also in the case of an action by husband and wife for words imputing incontinence to the wife; it was held, on

(*i*) *Brayne v. Cooper*, 5 M. & W. 249; and *supra*, p. 9. 9 H. L. 593; *Wilby v. Elston*, 8 C. B. 142; 18 L. J. C. P. 320; *Roberts and wife v. Roberts*, 33 L. J. Q. B. 249; 5 B. & S. 384; *Campbell and wife v. White and wife*, 5 Ir. C. L. R. 312.

(*k*) *Ibid.*
 (*l*) *Riding v. Smith*, 1 Ex. D. 91; 45 L. J. 281. (o) *Moore v. Meagher* (in Ex. Cham.), 1 Taunt. 39.

(*m*) *Knight v. Gibbs*, 1 A. & E. 43; 3 Nev. & Man. 469.

(*n*) *Vide Lynch v. Knight and wife*,

CHAPTER III.

demurrer, that the loss by the wife of the hospitality of certain friends, named in the Declaration, was a sufficient averment of special damage to sustain the action (*p*). But *illness*, occasioned by slander of the kind, was held not to constitute such special damage as would support the action (*q*); nor did the loss of the *consortium vicinorum* (*r*).

Slander of
Women Act,
1891.

And it was not until the year 1891, that a statute (*s*) was passed for amending the law in that respect as to the Slander of Women: by which it is enacted that, words spoken and published, after the passing of that Act, which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable.

Proviso as to
costs.

The statute contains a proviso, that in any action for words spoken and made actionable by that Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action.

Words of
drunkenness
when action-
able.

Words imputing drunkenness to a person in his office or calling, are not actionable except in cases where drunkenness would be a cause of deprivation, disqualification, or dismissal from office or employment; as in the case of a clergyman (*t*).

spoken of a
person in
command of a
Vessel;

And in the case of a master mariner in command of a vessel, of whom it was said, that during his stay at a certain port, he was frequently drunk; and in that state had to be carried to his boat to reach his vessel; the words were held actionable, without proof of special damage (*u*): one of the essential qualifications of a person having the command of a ship, being sobriety.

spoken of a
Town Coun-
cillor.

But words imputing habitual drunkenness, spoken of a Town Councillor, are not actionable in the absence of proof of special damage; such office not being one of profit, and the imputation not such as would be ground of removal from office (*x*).

(*p*) *Davies and wife v. Solomon*, 41 L. J. Q. B. 10; 20 W. R. 167.

(*q*) *Allsop and wife v. Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315.

(*r*) Com. Dig. tit. Act. on the case for Defamation (D. 30). *Lynch v. Knight and wife*, 9 H. L. 577; *Roberts and wife v. Roberts*, 5 B. & S. 384; 33

L. J. Q. B. 249.

(*s*) 54 & 55 Vic. c. 51.

(*t*) *Dod v. Robinson*, Aleyn, 63.

(*u*) *Irwin v. Brandwood and wife*, 2 H. & C. 960; 33 L. J. Ex. 257.

(*x*) *Alexander v. Jenkins and another* (1892), 1 Q. B. 797; 61 L. J. 634.

CHAPTER IV.

WORDS ACTIONABLE ONLY ON PROOF OF SPECIAL
DAMAGE.

<i>Words not necessarily imputing an indictable offence.</i>	<i>General terms of abuse as "Swindler,"</i>
<i>Words imputing petty larceny of fruit, flowers, &c.</i>	<i>"Black-leg," &c., &c.</i>
<i>Words imputing bad principles, &c.</i>	<i>Actions for words not per se defamatory.</i>

WORDS not necessarily imputing the commission of a particular crime or misdemeanour are not actionable, unless actual damage proceed therefrom; or unless they have a *tendency* to expose the person of whom they are spoken to peril; or unless they amount to slander of title; or slander in respect of office, trade, or profession; or impute to a person that he has an infectious disease. And until recently, verbal imputations of unchastity upon women were not actionable except under circumstances stated in the preceding chapter: but such imputations are now made actionable by statute (a), though no special damage be proved.

CHAPTER IV.
Words not necessarily imputing a particular crime.

There are many expressions which, if applied to a man, would have a tendency to drive him from society and hold him up to odium; but which are not actionable, when merely verbal, unless followed by special damage; because not conveying a charge of crime or misdemeanour.

And where the penalty for the offence charged is merely pecuniary, as in the case of trespass, petty larceny of growing fruit, flowers, or underwood, attached to the soil; words imputing the theft of such are not actionable; even though in default of payment of the fine or penalty, imprisonment may be inflicted; the imprisonment not being the primary and immediate punishment for the offence.

Words imputing trespass, petty larceny of fruit, flowers, &c.

Where bad principles and vicious propensities are imputed (merely verbally) to a person, he is not entitled to any compensation in damages without proof of a specific loss; though a person known to possess such principles and propensities

Words imputing bad principles or vicious propensities.

(a) The "Slander of Women Act," 1891, *supra*, p. 44.

- CHAPTER IV. is as likely to be despised and avoided in society as if he had actually reduced them into practice.
- General terms of abuse. General terms of abuse, expressive of evil inclinations and corrupt manners, as "rogue" (b), "rascal," "scoundrel," and the like, are not actionable, when the publication is merely verbal, for they do not impute any precise and definite offence punishable in the courts of justice. And, to say of a man that he is a coward, a profligate, a seducer, an adulterer, and such like, spoken in general terms, although highly defamatory and provoking, are not actionable. And to say of a person that he is corrupt, oppressive, cruel, tyrannical, &c., is considered as mere vague and vulgar abuse; and although injurious to the character of a person and painful to his feelings, such imputations, when merely verbal, give no right of action.
- Coward, Profligate, Adulterer.
- Cruel, Tyrannical.
- Swindler. The term "swindler" has also been held to be too general to support an action (c) of *slander*, unless spoken in relation to the plaintiff's office, trade, profession, or business (d). But to *print and publish* of any person that he is a swindler, is actionable, whether published with reference to his office or not (e). To charge a person with being a *gambler* simply, is not actionable, but to say that he is a *cheating gambler* would be actionable (f). To say of a man, "He has defrauded a mealman of a roan horse," is not actionable without special damage; it not being said to have been done by a false pretence (g). To impute in general terms to a tradesman that he is a cheat, is not actionable, unless the words are spoken of him in his trade (h). But to say of a tradesman, with reference to his trade, that he has cheated a certain person, is actionable (i).
- Gambler.
- Cheat.
- Traitor, Thief, Murderer, &c. General words, such as "traitor," "thief," "murderer," "sheep-stealer," &c., have been held, in some of the old cases (k), to be actionable; but the tendency of the courts in modern times has been to discourage such actions, unless a direct charge of a specific crime or misdemeanour be imputed,

(b) 3 Bl. C. 124; 1 Vin. Ab. 417. 570.
 (c) 1 T. R. 753; 2 H. Blac. 531. (k) See Bro. Ac. Sur le Cas. pl. 2;
 (d) *Black v. Hunt*, L. R. (Ir.) 2 27 Hen. 8, 14; 3 Buls. 303; Cro. Car.
 Q. B. D. 10. 276; Poph. 210; Sty. 235; Ow. 62;
 (e) *L'Anson v. Stuart*, 1 T. R. 748. Noy, 61; 1 Vin. Abr. 405; Cro. Eliz.
 (f) See *Barnett v. Allen*, *infra*. 308; Cro. Jac. 158; 1 Rol. Abr. 41;
 (g) *Richardson v. Allen*, 2 Chit. 657. *Jones v. Herne*, 2 Wils. 87; and see
 (h) 2 Salk. 694; 3 Salk. 326. *Thompson v. Bernard*, 1 Camp. 48;
 (i) *Ireland v. Lockwood*, Cro. Car. *Cristie v. Cowell*, Peake's Ca. 4.

or some special damage ensue from the imputation. And CHAPTER IV. where the defendant said, "I am surprised at R. allowing a Black-leg. black-leg in this room," it was held (per Pollock, C.B., and Watson, B.), that the words were not actionable without proof of special damage, as the term "black-leg" did not necessarily mean that the plaintiff was a cheating gambler. But (per Martin and Bramwell, BB.), that it was a question for the jury whether the defendant meant to impute to the plaintiff that he had been guilty of an offence for which he was liable to be indicted under the statute for cheating; and that the jury having found that the defendant made use of the words with the intention of conveying to the minds of his hearers that the plaintiff was a cheating gambler, and that being the sense in which the words would be reasonably understood, the action was maintainable (l). The terms "black-leg" and "black-sheep" may be actionable, as signifying persons guilty Black-sheep. of cheating others—as by fraudulent play at cards (m).

Where the slander alleged was, that of saying of the plaintiff Welcher. that he was a "welcher;" (innuendo, "meaning thereby a person who dishonestly appropriates and embezzles money deposited with him"): the evidence, however was, that a "welcher" is a person who receives money deposited to abide the event of a race with a pre-determined intention to keep it, and not to part with it in any event: it was held, that the innuendo was not supported by the evidence; and that it did not appear that an indictable offence was imputed, nor that the term "welcher" necessarily meant embezzlement (n).

The defendant said that the plaintiff "had two bastards, and should have kept them;" by reason of which words, Imputation upon a man of having bastard children. † discord arose between the plaintiff and his wife, and they were likely to have been divorced. After verdict it was moved, in arrest of judgment, that these words were not actionable, because he doth not show any temporal loss, as loss of marriage, or the like; and this imagination to be divorced is not to any purpose; and it is but a causeless fear; and of that opinion were all the court (o).

With regard to actions for words not in themselves defamatory, it has been authoritatively laid down as a general Actions for words not per se defamatory proposition that any words are actionable by reason of which

(l) *Barnett v. Allen*, 3 H. & N. 381; p. 168.
27 L. J. Ex. 412.

(n) *Blackman v. Bryant*, 27 L. T.

(m) *O'Brien v. Clement*, 16 M. & W. (N.S.) 491.
159; *O'Brien v. Bryant*. same vol.

(o) *Barmund's case*, Cro. Jac. 473.

CHAPTER IV. a party suffers special damage (*p*). But the special damage arising from the publication must be clearly traced to the speaking or publishing of the injurious statement (*q*).

And accordingly, an action will lie for the publication of a false and malicious statement, whether written or oral, though not actionable *per se*, nor even defamatory; if actual damage result therefrom (*r*). Such an action, though not one of libel or of slander, is in the nature of an action on the case for damage wilfully done without just occasion or lawful excuse, and is analogous to an action of Slander of Title.

But where it was alleged, that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the words, "She secreted 1s. and 6d. under the till; stating, these are not times to be robbed:" it was held, on motion in arrest of judgment, that the words (as alleged) were not, *per se*, defamatory; and therefore were not actionable, though followed by special damage (*s*). And where the plaintiff complained of defamatory words spoken of him in relation to his business; and alleging special damage; the words proved reflected on him personally, and were not, in their nature, defamatory: it was held, by the Court of Queen's Bench in Ireland, that the plaintiff was rightly nonsuited at the trial (*t*).

And it has been held, that a statement, false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably under some circumstances, and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action for defamation. And so, where the declaration alleged that the defendant falsely and maliciously spoke and published of the plaintiff, a working stonemason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and also, "He has stopped several good jobs from being carried out, by being the ringleader of the system at L.," whereby the plaintiff was discharged from his employment, and prevented from obtaining other employment in his trade at L.: it was held, on demurrer, that the words not being in themselves defamatory,

(*p*) Com. Dig. Ac. on Ca. for Defam. (D. 30).

(*q*) *Vide Green v. Button*, 2 C. M. & R. 707.

(*r*) *Ratcliffe v. Evans* (1892), 2 Q. B. 524; 61 L. J. 536; *Davneey v. Hollo-*

way, C. A. (1901), 2 K. B. 441.

(*s*) *Kelly v. Partington*, 5 B. & Adol. 645.

(*t*) *Sheahan v. Ahearne*, Ir. R. 9 C. L. S. 412.

nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of speaking the words, the action could not be sustained (*u*). CHAPTER IV.

It has, however, been held, that where one man states concerning another, who is a trader earning his livelihood by his trade, *anything*, the natural tendency and consequence of the uttering of which is injurious to him in his trade—as by deterring customers, who would otherwise have resorted to his shop, from going thereto—if such statement leads to loss of trade, it is actionable (*r*).

CHAPTER V.

SLANDER OF TITLE.

Slander of Title, what is, and redress for.

Where the words affect the probability of the Plaintiff's succeeding to an estate.

Slander of an heir-at-law.

Where the slander impeaches Plaintiff's present title.

Incidents to the action.

Where the Defendant claims not a title in himself but in another.

Where defendant has an interest in probable expectation.

Slander of Title to Personal Property.

As to the absence of probable cause.

As to Special Damage in actions for slander of title.

As to the Pleadings in actions for slander of title.

WHERE the words or writing tend to the disherison of a person, or affect his Title to real or personal estate, the offence is termed a Slander of Title, which is actionable at common law: in the one case without proof of special damage—as, to impute that an heir-apparent is a bastard—in the other, where the slander affects the *present* title of the plaintiff, special damage must be proved. CHAPTER V.

Where a party extra-judicially asserts his title to the lands of another, the very fact of his making a claim precludes the owner who is injured by it, from recovering in an ordinary action for slander, independently of any inquiry as to the sincerity of the claimant (*a*); for it would be highly inconvenient and impolitic to subject the motive and intention of a

Slander of Title: what is? and redress for.

Where one asserts a title to the lands of another.

(*u*) *Miller v. David*, L. R. 9 C. P. 45 L. J. 282.

118; 43 L. J. C. P. 84.

(*x*) *Riding v. Smith*, 1 Ex. D. 91;

F.S.

(*a*) *Gerard v. Dickenson*, 4 Co. 18.

CHAPTER V.

claimant generally to legal inquiry. But, on the other hand, where a party makes such a claim *maliciously* and *without any probable cause*, he is liable to a special action, alleging malice and the want of probable cause. So that if B. published that he had a lease of Blackacre for one thousand years, he would not be liable to an ordinary action for slander though he had no such lease. But still he would be liable to a special action on the case if he made such an assertion knowing it to be false, or, as it seems, without any probable cause (b).

An action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title (c). But slander of Title may be of such a nature as to fall within the scope of ordinary slander.

Slander of Title, ordinarily, means a statement of something tending to cut down the extent of Title of the Plaintiff, which is injurious only if it be false (d). An action will lie for a slander of the plaintiff's title to goods (e) or other property, as well as to lands. So also for slander of title to letters-patent (f); or to copyright (g).

As to the distinction between a Slander of the Plaintiff in his business, and a slander of his title to certain personal property, see the cases cited below (h).

It makes no difference as to the legal ground of the action for Slander of Title, whether the slander be merely verbal, or by letter or other written publication; but if the publication be in writing, as by advertisement, or other wide circulation, and therefore likely to be more permanently injurious in its nature, the damages may be estimated accordingly (i). And when published in writing, it is indictable, as well as actionable, at common law (k).

When published in writing, is indictable, as well as actionable.

(b) Jenk. 247; Cro. E. 14; Mo. 144, 188, 410; 1 Roll. R. 244, 409; 4 Rep. 18; Yelv. 89; Cro. Car. 140; Cro. J. 197, 485; 3 Buls. 75; Pul. 529.

(c) *Malachy v. Soper and another*, 3 Bing. N. C. 383-4; 3 Scott, 723.

(d) See *Pater v. Baker*, 3 C. B. 868, per Maule, J.

(e) *Gutsale v. Mathers*, 1 M. & W. 495; 1 Tyr. & Gr. 694; *Carr v. Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468; *Steward v. Young*, 39 L. J. C. P. 85; L. R. 5 C. P. 122.

(f) *Haddon v. Lott*, 24 L. J. C. P.

49; and see *Wren and another v. Wild*, 10 B. & S. 51; 38 L. J. Q. B. 88 & 327; *Halsey v. Brotherhood*, 15 Ch. D. 514; 19 *ib.* 386; 51 L. J. 233.

(g) *Hart v. Wall*, 2 C. P. D. 146; 46 L. J. 227.

(h) *Malachy v. Soper and another*, 3 Scott, 723; 3 Bing. N. C. 371; *Gutsale v. Mathers*, 1 M. & W. 495; 1 Tyrw. & Gr. 694; *Carr v. Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468.

(i) *Malachy v. Soper and another*, 3 Bing. N. C. 371; 3 Scott, 723.

(k) See *Peacock v. Reynell*, *infra*.

Words falling within the division termed "Slander of Title," either affect the probability of the plaintiff's succeeding to an estate in future, or impeach a title which has already accrued.

Instances of the former class, where damages have been allowed to be recovered on account of the manifest tendency of the imputation to defeat the plaintiff's expectations, are exceedingly rare, and seem to have been confined to words impeaching the legitimacy of the births of heirs-apparent. The defendant said to the plaintiff, who was heir-apparent to his father and uncle, "Thou art a bastard" (l). After verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action was maintainable; since by reason of the words, the plaintiff might be in disgrace with his father and his uncle, and they conceiving a jealousy of him touching the same, might possibly disinherit him; and that although they eventually should not do so, yet that the action would lie for the damage which might come; and the cases of *Vaughan v. Leigh* and of *Banister v. Banister* (m), were cited by Jones, J., as in point. In the first of these cases (n) the plaintiff showed that land had been given in tail to his grandfather, and that his father had divers sons, whereof he was the youngest, and his elder brothers living. That a certain person offered to buy the land, and was willing to give him such a sum of money for his title; and by reason of the words, refused to give him any thing. After judgment for the plaintiff in the Exchequer, it was assigned for error, that it appeared by the plaintiff's own showing that he had not any present title, and therefore no cause of action. But the two Chief Justices conceived that although he had not any present title, it appeared that he had a possibility of inheriting the lands; and that being offered a sum of money to join in the assurance, although he had not any present title, yet by reason of the words he had a present damage, and in future might receive prejudice thereby in case he were to claim the lands by descent. This case, though cited as an authority for the former decision, does not warrant it to the full extent; for in the latter a loss had actually accrued to the plaintiff in consequence of the words: in the former the supposed prejudice consisted in the probability that the expectation of the heir-apparent would be defeated.

(l) *Humphrys v. Stanfield*, Cro. Car. 469; Jo. 388; Godb. 451.

(n) Cro. Jac. 213, by the name of *Vaughan v. Ellis*.

(m) 4 Coke, 17; Jones, 388.

CHAPTER V.
Slander in
writing, of an
heir-at-law.

In a case in the Star Chamber, one Peacock exhibited his bill of indictment against Sir George Reynell, for a libel written under the following circumstances:—The prosecutor was heir-general to Richard Peacock, who was of the age of 86 years, and had lands of inheritance of the value of £800 a-year: the defendant, who had married the daughter of Sir Edward Peacock, who was a younger brother of Richard Peacock, wrote a letter to Richard Peacock, informing him, that the prosecutor was not the son of a Peacock, and was a haunter of taverns, and that divers women had followed him from London to the place of his dwelling, and that he had desire to hear of the death of the said Richard, and that all the inheritance would not be sufficient to satisfy his debts; and many other matters concerning his reputation and credit: this was held to be a libel; and the defendant was fined £200 and imprisonment according to the course of the court; and the prosecutor “let loose to the Common Law for his recompense for the damages which he had sustained” (o).

Imputation of
bastardy upon
heir-apparent.

In the case of *Turner v. Sterling*, it was said by the court, “The law gives an action for but a possibility of damage, as an action lies for calling an heir-apparent—bastard” (p). In an earlier case the court observed, “The word ‘bastard’ is determinable by the Spiritual Court, but if the plaintiff add further words to entitle himself as heir, or show some *possibility* of being heir, this shall make the same words calling him bastard to be actionable” (q). The decisions upon this point do not, however, appear to have been uniform. In the case of *Turner v. Sterling*, above cited, Vaughan, J., said, “I take it not to be actionable to call a man a bastard whilst his father is alive, the books are cross in it; nay, if lands had descended, I doubt whether it would be actionable any more than to say one has no title to land.” But in the case of *Humphrys v. Stanfield* (r), already referred to, it was decided that words which alleged that an heir-apparent was a bastard, were actionable.

For words
impeaching
Plaintiff's
present Title,
special damage
must be
shown.

Words impeaching the plaintiff's *present title* to lands, have in many of the older cases been deemed to be actionable without proof of special damage. Thus, where a remainder-man brought an action against the defendant for saying that the tenant in tail had issue, one D., who was then alive; it was

(o) *Peacock v. Reynell*, 2 Brownlow, 151. sent. See also 1 Roll. Abr. 37, pl. 18.

(q) 2 Buls. 90.

(p) 2 Vent. 26; Vaughan, J., dis-

(r) Cro. Car. 469.

held, that the action was maintainable (s). It appears, however, from a copious class of decisions, that no action can be supported for words affecting the *present title* of a plaintiff to an estate, without showing that some special damage and inconvenience has resulted from them, as that he was prevented from selling or making some advantageous disposition of it (t). In *Elborow v. Allen*, the action was brought for the words, "He is but a bastard," spoken of the plaintiff, who had lands by descent; by means of which he was put to great expense to defend his title. And two of the justices, against the opinion of Doderidge, J., decided that the words were actionable, the plaintiff having averred in his declaration that he was put to a great charge to defend his inheritance (u). Although the numerous decisions upon the subject seem to leave no doubt that words reflecting upon a party's present title must, to give a right of action, be attended with special damage, it does not follow as an immediate and necessary consequence of this doctrine, that imputations immediately tending to defeat the prospects of the heir-apparent, are not in themselves actionable; though it appears at first sight somewhat strange to say that it can be considered more prejudicial to impeach a title resting merely in expectancy, than to derogate from one already existing. There is, however, a plain line of distinction between the two cases. Where lands have already descended to the heir, to call him "bastard" can work little prejudice; the false imputation cannot divest the estate, though it may involve the owner in litigation, for which special damage he is entitled to his remedy; but reflections of this nature, when cast upon an heir-apparent, may produce consequences infinitely more serious, for they may induce the ancestor to disinherit the progeny which he conceives to be spurious. In the former case the evil resulting from the slander can be but slight and temporary, in the latter it may prove utterly irremediable. The cases relating to words of the latter description are of considerable antiquity and of rare occurrence, and though they certainly carry the doctrine of presumptive and anticipative loss to a great extent, yet they seem to be supported and warranted by the application of sound and general principles to the peculiar exigency of the case.

(s) *Bliss v. Stafford*, Ow. 37; Mo. 188; Jenk. 247.

(t) Cro. Eliz. 196; 3 Keb. 153; 1 Vin. Ab. 553; Sty. 169, 176; Palm. 529; *Sneade v. Badley*, 3 Buls. 74;

Brook v. Rawl, 4 Ex. 521; *Haddam v. Lott*, 24 L. J. C. P. 49; *Malachy v. Soper*, 3 Bing. N. C. 371; 3 Scott, 723.

(u) Cro. J. 642.

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No right of property in the name of an estate.

Where the plaintiffs alleged that they were possessed of a house and lands in Middlesex, known as "Ashford Lodge"; that the same had for more than sixty years been commonly called and known by that name, and was so designated in all conveyances and leases thereof, and in the memorials of registration; that the defendant, having acquired a small estate adjoining, and in parts bordering on the Ashford Lodge estate, which for forty years and upwards had been known as "Ashford Villa," and had been so designated in all conveyances, &c., wrongfully and unlawfully changed the name of his villa, and proceeded to call and style it "Ashford Lodge"; and that by reason of such change of name and adoption of the name of the plaintiffs' house, the plaintiffs had suffered damage, personal inconvenience, and annoyance, and the defendant had thereby damaged the means of identifying the plaintiffs' house and estate and the title thereto, and the value thereof; and the plaintiffs claimed an injunction restraining the defendant from styling or describing his villa and estate as "Ashford Lodge." The defendant demurred, on the ground that the facts alleged did not amount to slander of title, or entitle the plaintiffs to any relief either by injunction or damages. The demurrer having been over-ruled; it was held, on appeal, that there is no right of property in the name affixed to any landed property, whether consisting of house or land; nor any right either at law or in equity to the exclusive use of any such name; and, therefore, no legal right had been invaded; and there being no allegation of malice or intention to cause the damage alleged, the demurrer was allowed (x).

Corporations and Companies may sue for slander of title.

Incidents to the action for Slander of Title.

Corporations and companies may maintain actions for slander of their title, whether the slander be uttered by one of their own members or by a stranger (y).

The words must be spoken pending some treaty, or public auction, for the sale or purchase of the property, or the action will not lie (z); and it must be such a slander as goes directly to defeat the plaintiff's title (a). And unless the plaintiff show *falsehood and malice* in the defendant,

(x) *Day v. Brownrigg*, 10 Ch. D. 294; 48 L. J. 173. See as to the right of the proprietor of a newspaper to prevent any person from adopting the same, or a similar title to that of his newspaper, *Walter v. Emmott*, 54 L. J. Ch. 1059.

(y) *Metropoln. Saloon Omnibus Company v. Hawkins*, 4 H. & N. 90; 28 L. J. Ex. 201.

(z) *Sir Jno. Tasburgh v. Day*, Cro. Jac. 484.

(a) *Hargrave v. Le Breton*, 4 Bur. 2423.

and an injury to himself, he establishes no case to go to the jury (b). CHAPTER V.

It is essential for giving a cause of action for slander of title, that the statement should be false: so, also, that it should be malicious; not malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true; if there really be the infirmity in the title that is suggested, no action will lie, however malicious the defendant's intention may have been (c). But malice, either express or implied, must be established (d), in order to sustain the action (e). The words must be false and malicious.

In the case of an ordinary action for slander of title, where the defendant claims no title in himself, but either denies the plaintiff's title directly or impliedly, by asserting a title in another,—and where for anything that appears to the contrary it is the mere wanton act of a stranger, there being nothing to explain his motive or conduct,—it seems that the ordinary principle would prevail; and malice in law would result from the very act of the defendant, in doing that which was likely to occasion damage, in the absence of any circumstances which would furnish any legal justification or excuse; and therefore the privilege which belongs to one who asserts his own claim does not protect him in falsely asserting a title in a mere stranger (f). Where the Defendant claims not a Title in himself but in another.

Where the defendant in an action for slander of title, is not a mere wrongful intruder, but connected in interest, though remotely, with the transaction, the question is, whether he acted *bonâ fide*, or with a malicious intention to injure the owner,—and this is properly a question of fact for the jury under all the circumstances. In the case of *Smith v. Spooner* (g), the action was brought for preventing the sale of leasehold property, by the assignee of the lessee, against the owner of the property, who had declared at the time of putting up the property for sale, that the plaintiff could make no title. It appeared, that the defendant was present when the lot was put up, and that he then told the auctioneer that it was of no use to sell it, as his house was his own; he was the landlord, and that no title could be made to it. On this, some persons who had attended to bid retired, and the defendant offered to Where the Defendant is connected in interest with the transaction :
question of *bonâ fides* for the jury.

(b) *Pater v. Baker*, 3 C. B. 869; 2423; *Steward v. Young*, 39 L. J. C. P. 85; L. R. 5 C. P. 122.

(c) Per Maule, J., in *Pater v. Baker* 3 C. B. 868. (f) *Pennyman v. Habanks*, Cro. Eliz. 427; 1 Vin. Ab. 551, pl. 11; Jenk. 247.

(d) *Smith v. Spooner*, 3 Taunt. 246. (g) 3 Taunt. 246.

(e) *Hargrave v. Le Breton*, 4 Bur.

CHAPTER V. purchase the lease, having also made a previous offer of the same kind. Previous to the trial, the defendant had obtained possession of the premises by an ejectment, and the plaintiff's attorney had tendered him five quarters' rent, and the costs of the ejectment, if he would deliver back the possession. The jury found a verdict for the plaintiff; but the court afterwards directed a nonsuit to be entered, on the ground that there was no evidence of express malice. But in a subsequent case (*h*), where the owner of a house had prevented the plaintiff, who held under a lease for years, from disposing of the remainder of his term, by falsely asserting that he had *no title*; the court, after a verdict for the plaintiff, refused a rule to show cause why there should not be a new trial. Lord Ellenborough, C.J., observing, that "The circumstances of the defendant's title and interest may rebut the implication of malice; but here it was left to the jury to say whether there was malice or not."

Where Defendant has an interest in probable expectation.

Where the alleged slander of title was conveyed in a letter (*i*), to a person about to purchase the estate from the plaintiff, imputing insanity to Y. from whom the plaintiff purchased it, and stating that the title would therefore be disputed; in consequence of which, the person refused to complete the purchase: it appeared, that the defendant had married the sister of Y. who was heir-apparent to her brother: and the court held, that under the circumstances, the defendant ought to have the free liberty of stating objections to the title to the proposed purchaser, as in the case of *Gerard v. Dickenson and others* (*k*), which was not stronger than the present, though such a liberty was not to be allowed to a mere stranger, according to a rule in Jenkins' Centuries, *immiscet rei se alienæ* (*l*), but that it was impossible to treat the defendant as a stranger; for though he was indeed a stranger to any vested interest, he had an interest in probable expectation, so as to induce him to bestir himself and look about, lest an improper conveyance should be made injurious to his right. That the question distinctly and substantively was, whether the defendant, in making the communication which he had made, had acted *bonâ fide*, believing it to be true.

(*h*) *Smith v. Spooner*, K. B. Mich. 1811. Quære? whether the parties were not the same as in the case of *Smith v. Spooner*, 3 Taunt. 246, in which a nonsuit was entered in the

C. P. Mich. 1810.

(*i*) *Pitt v. Donoran*, 1 M. & S. 639; and see *Steward v. Young*, *infra*.

(*k*) *Supra*, p. 49.

(*l*) 247, *placitum* 36.

Where a man has no pecuniary motive, and the act is *equivocal*, the charitable presumption is that he is not actuated by bad motives (*m*). If some portions of the statement which a person makes are *bonâ fide*, but others are *malâ fide* and occasion injury to another, the injured party cannot recover damages, unless he can distinctly trace the damage as resulting from that part which is made *malâ fide* (*n*).

CHAPTER V.
Statements in part *bonâ fide*, and in other part *malâ fide*.

A solicitor to a creditor who had previously committed an act of bankruptcy, stopped the sale of an estate previously mortgaged and assigned to the plaintiff, by declaring the creditor's bankruptcy, and that a docket had been made out for a commission; it transpired that an act of bankruptcy had been committed, but that no commission had been sued out. On action brought, it was held, that in order to support it, there should be proof of malice, either express or implied; that if the defendant acted *bonâ fide*, and told the truth, he did no more than his duty; and though he went beyond what was strictly true, still if there was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable (*o*).

Solicitor stopping sale of estate, on ground of alleged bankruptcy.

And where on the property known as Barnard's Inn (one of the old Inns of Chancery) being put up for sale by public auction, by the trustees, the defendant, with others, styling themselves the "Inns of Chancery Defence Society," attended the auction and protested against the sale, stating that an action had been commenced to stop the sale, and had been registered as a *lis pendens*, and asserting their right and interest in the property as law-students of the Inn: as a fact the defendant had commenced an action against the trustees but discontinued it, not having complied with a peremptory order of the court to deliver a statement of claim. The trustees having brought an action against the defendant for slandering their title, an interim injunction was granted restraining the defendant until the trial of this action, or further order, from slandering the title of the plaintiffs or otherwise interfering with the sale of the property (*p*).

Slander of Title, spoken at a public auction.

Where an action for slander of title was brought against a surveyor of highways, for words spoken to intending purchasers at a public auction of unfinished houses; to the effect that he

Surveyor of highways acting on erroneous view of duty.

(*m*) Per Maule, J., in *Pater v. Baker*, 3 C. B. 869.

(*o*) *Hargrave v. Le Breton*, 4 Burr. 2422.

(*n*) *Brook v. Rawl*, 4 Ex. 524, per Parke, B.

(*p*) *Frere v. Vidler*, January 11th, 1889, cor. Kay, J.

CHAPTER V. should not allow the houses to be finished until the roads were made good: it was held, that malice was not to be inferred from the circumstance of the defendant having acted upon an incorrect view of duty, founded upon an erroneous construction of the statute (*q*).

Slander of
Title by advertisement
offering
reward for
supposed
Will.

In another case the defendant issued an advertisement, offering a reward for the production of a supposed Will of a deceased person, whose property the plaintiff (widow of deceased) had advertised for sale as administratrix: the defendant, although told by the attorney for the deceased, that there was no Will, attended the sale and made statements which prevented any person from bidding. Cockburn, L.C.J., directed the jury that the question for them was, whether, after the defendant's interview with the attorney, he could have had an honest and reasonable belief that deceased had left a Will (*r*).

Slander of
Title to personal
property.

Slander of title to property other than real estate is also a ground of action; but special damage must be alleged and proved, or the action will fail.

Malice must
be shown.

The plaintiff must also show malice in the defendant. And this rule applies where a reversioner, who had no present title to certain trade fixtures, *bonâ fide* asserted that the fixtures were his; it was ruled, that there being no evidence of malice the action could not be sustained (*s*).

Slander of
Title to
Furniture.

And where A. died possessed of furniture in a beer-shop,—his widow, without taking out administration, continued in possession of the beer-shop for 3 or 4 years, and then died, having whilst so in possession, conveyed all the furniture by bill of sale to her landlords, by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlord's agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited: and it was held, that the mere fact of the defendant having been told before the sale that the bill of sale was invalid, was no evidence of malice to

(*q*) *Pater v. Baker*, 3 C. B. 831.

(*s*) *Baker and others v. Piper*, 2

(*r*) *Atkins v. Perrin*, 3 F. & F. 179. Times L. Rep. 733, per Manisty, J.

be left to the jury, and that the plaintiff was therefore properly nonsuited (t). CHAPTER V.

In an action for slander of title to letters patent of certain spooling-machines, the alleged slander was contained in letters written by the defendant to persons in treaty with the plaintiffs for the purchase of some of their spooling-machines, intimating that such were infringements of a patent belonging to the defendant and claiming royalties for their use: it was held, that the action would not lie without affirmative proof that the claim of the defendant was a *malâ fide* and malicious attempt to injure the plaintiffs, by asserting a claim of right against his own knowledge that it was without foundation (u). And in a subsequent case, it was held, that an action of slander of title will not lie for statements published by a patentee impugning machines made by others as infringements of his patent; unless such statements are not only untrue, but *malâ fide*, and made without reasonable or probable cause, and not in the *bonâ fide* defence of his own property (x). Slander of Title to letters patent.
Charge of infringement by rival patentee.

But by the Patents, Designs and Trade Marks Act, 1883 (y), it is enacted that, "Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats, with due diligence commences and prosecutes an action for infringement of his patent." Threats of legal proceedings by patentee.

(t) *Steward v. Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85. It has been held by the Court of Appeal of the State of New York, that an action will lie for slander of title to a *growing crop of rye*. The slander in that case consisted in a public statement made by the defendant at an auction, that the rye was his, and he forbade the sale; whereby the rye was sold for less than its value. The jury found that the statement was made falsely and mali-

ciously. *Like v. McKinstry*, 4 Keyes Rep. 397.

(u) *Wren and another v. Weild*, 38 L. J. Q. B. 327; 10 B. & S. 51; L. R. 4 Q. B. 730; but see 46 & 47 Vic. c. 57, s. 32; also *Royal Baking Powder Co. v. Wright* (1900), 18 Rep. Pat. Cas. 95.

(x) *Halsey v. Brotherhood*, 15 Ch. D. 514; 19 Ch. D. 386; 51 L. J. 233.

(y) 46 & 47 Vic. c. 57, s. 32.

CHAPTER V.
Slander of
Title to
Pictures,
Chromo-litho-
graphs, Prints,
&c.

It appears, that an action may be maintained for slander of title to a picture, a chromo-lithograph, or a print of a painted picture. And so, where A. was the owner of a copyright in an engraving after an original oil-painting, which itself was not protected; B. published a chromo-lithographed pattern for working the subject of the original picture in Berlin wool-work. This pattern was obtained by copying the engraving. A. warned a vendor of B.'s pattern, by printed circular, that to sell unauthorised copies of the subject referred to was an infringement of his copyright. B. brought an action against A. for slandering his title to the wool-work pattern, and for consequential damages. The damage actually traced to A.'s circular was very trifling. It was held by the Court of Appeal, that the wool-work pattern was no infringement of the copyright in the engraving, and that the action for slander of title would have been maintainable if any real or substantial damage had been proved (z).

Imputation
upon Vocalists,
of infringe-
ment of
Musical
Copyright.

Where the plaintiffs, who were vocalists, had been engaged to sing, and had sung, at certain music halls; and stated in advertisements issued by them, that they had the permission of certain music publishers to sing any *morceaux* from their musical publications: the defendant wrote letters to the plaintiff's employers casting a doubt upon the authority and *bonâ fides* of the vocalists for the statement of permission contained in their advertisements; and adding, that he "held powers of attorney over certain musical publications issued by the publishers in question, as to the sole liberty of public performance, which right they (the publishers) never possessed." And that "the advertisement in question was calculated to cause employers to incur penalties under the Copyright Acts." The plaintiffs, in consequence, were dismissed by their employers and their engagements terminated. At the trial, before Archibald, J. (after consulting Quain, J.), a nonsuit was directed, on the ground that the letters were not libellous. A rule was afterwards made absolute for a new trial (by Lord Coleridge, C.J., and Lindley, J.), on the ground that the letters were reasonably open to a libellous construction, which was a question for the jury, and should have been submitted to them for their consideration (a).

(z) *Dicks v. Brooks*, 15 Ch. D. 39; 49 L. J. 812.

(a) *Hart v. Wall*, 2 C. P. D. 146; 46 L. J. 227. But see the observa-

tions of Lord Blackburn on this case, 7 App. Cas. 777; 52 L. J. Q. B. D. 251.

As to the absence of probable cause.—Where a person, not a mere stranger, is sued in an action for slander of title, it must be proved on the part of the plaintiff, that the defendant acted without probable cause; and also that in making the communication he acted maliciously (*b*). It is also a question in the case whether the defendant had such a degree of interest in the subject-matter as to prevent his being looked upon in the light of a stranger. In a case (*c*) in which the plaintiff declared, that he was seised of the manor and castle of H. by purchase from Lord Audley, and that he was about to demise the same to Ralph Egerton for a term of twenty-two years; that the defendant said, “I have a lease of the castle and manor of H. for ninety years,” and then and there showed and published a demise, supposed to be made by George, Lord Audley, grandfather to the said Lord Audley, for ninety years, to Edward Dickenson, her husband; and published the said demise as a good and true lease, when, in fact, the lease was counterfeited by her husband, and the defendant *knew it to be counterfeited*; by reason of which words, the said R. E. did not proceed to accept the plaintiff’s lease. The defendant, in her plea, denied her knowledge of the forgery; and the plaintiff demurred. It was resolved,—1. That if the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H., but that she herself had right to them; in that case, because the defendant herself pretended right to them, although in truth she had none, no action would lie. And, therefore, that for the said words, “I have a lease of the manor of H. for ninety years,” although it be false, yet no action will lie for slandering his title or interest in the said castle and manor. 2ndly. That there was other matter in the declaration sufficient to maintain the action, and that was because it was alleged that the defendant knew of the communication of the making of the lease to R. Egerton, and knew also that her alleged lease was forged and counterfeited; and yet, against her knowledge, she had affirmed and published that it was a good and true lease. So in the case of *Goulding v. Herring* (*d*) it was agreed, that though the plaintiff claims a title, yet if it be found to be done *maliciously*, the action lies; but if, upon evidence, *any probable cause of claim* appears, it ought not to be found *maliciously*. So, according to

CHAPTER V.

When malice
and the
absence of
probable cause
are to be con-
sidered.

(*b*) Per Bayley, J., in *Pitt v. Dono-* Rep. 18; Cro. Eliz. 197.
can, 1 M. & S. 649.

(*d*) 1 Rol. 141.

(*c*) *Sir G. Gerard v. Dickenson*, 4

CHAPTER V. Rolle, C.J. (e), "If I have colour of title to land, and I say to another, I have better title to the land than you, no action will lie against me, though my title be not so good as the other is."

In the absence of probable cause the jury *may* infer malice, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action (f).

When proof of special damage necessary and when not.

As to special damage in actions for slander of title.—Where the slander tends to the disherison of one, as an heir-apparent, the action may be sustained without proof of special damage (g): but where it affects the present title of the plaintiff, special damage must be shown (h), and proved to have arisen from the slander (i).

Nature of the special damage.

Where a party is prevented from selling, exchanging, or making any advantageous disposition of lands, or other property, in consequence of the interference of another, he may maintain an action for the inconvenience he has suffered; but special damage must be shown; and the mere apprehension, that in consequence of the slander, the plaintiff's title may be drawn in question, will not support an action. And it is not sufficient to show generally that the plaintiff intended to sell to any one who would buy, but he must prove that he was in treaty to sell to some specific person (k), or at least that some one was deterred by the slander from making an offer. Neither will it suffice to show, that the value of the lands was lessened in people's opinions; but proof must be given of damage actually sustained. Where the alleged loss consists in the prevention of the sale of lands, it must appear that the words directly tended to defeat the plaintiff's title (l). The defendant said, "M. has mortgaged all his lands for £100, and has no power to sell or let the same." And, because no special damage nor particular colloquium was laid of a treaty to sell them to any person certain, but only in general that he intended to sell to any one who would purchase, which is too general, judgment was arrested (m).

(e) Sty. 414.

(f) Per Maule, J., in *Pater v. Baker*, 3 C. B. 868.

(g) *Humphrys v. Stanfield*, Cro. Car. 469; Godb. 451; and see Cro. Jac. 215; 4 Co. 17.

(h) *Law v. Harwood*, Cro. Car. 140.

(i) *Cune v. Golding*, Style's Rep.

169, 176; *Brook v. Rowl*, 4 Ex. 521; *Haddon v. Lott*, 24 L. J. C. P. 49.

(k) *Manning v. Acery*, 3 Keb. 153.

(l) 5 Burr. 2622.

(m) *Manning v. Acery*, 3 Keb. 153; 1 Vin. Ab. 553, pl. 21; Sty. 169, 176; Palm. 529.

The plaintiff was possessed of certain shares in a mine, as to which shares certain claimants had filed a Bill in Chancery, to which the plaintiff had demurred: the defendant falsely and maliciously published that the demurrer had been overruled; that the prayer of the petition for the appointment of a receiver had been granted; and that persons duly authorised had arrived at the mine: it was held, that the action was not maintainable without special damage (*n*), and that it was not sufficient to allege as special damage that the plaintiff was injured in his rights; that his shares were depreciated in value; that divers persons had believed and still did believe that he had no right to such shares; that the mine could not be worked for his benefit, and that he had been prevented from selling or disposing of his shares in the said mine, and from gaining divers profits, &c. (*o*).

Mere inferential damage is not sufficient to support the action (*p*). It must be shown that a legal right has been intentionally invaded, and that some specific damage has actually resulted therefrom (*q*). Where the action was for falsely and maliciously stating at the sale of a lease and assignment of premises, whereof the defendant was the original lessor, that "the whole of the covenants of this lease are broken, and I have served notice of ejectment; the premises will cost £70 to put them in repair;" by reason of which statement the property sold for less than it otherwise would have done: it was held, that the question for the jury was, whether the words were false and malicious, and whether the special damage arose therefrom (*r*). And if such special damage be not due to any wrongful act on the part of the defendants, they will not be liable (*s*).

As to the pleadings in actions for slander of title.—As to the Procedure, every pleading must contain, as concisely as may be, a statement of the *material facts* on which the party pleading relies; but not the evidence by which they are to be proved. It is therefore obvious that, in framing the Statement of Claim in an action for slander of title, the cause of action

Statement of
claim, in
Slander of
Title.

(*n*) *Malachy v. Soper and another*,

3 Bing. N. C. 371; 3 Scott, 723.

(*o*) *Ibid.*

(*p*) *Haddon v. Lott*, 15 C. B. 411;

24 L. J. C. P. 49.

(*q*) *Day v. Brownrigg*, 10 Ch. D.

294; 48 L. J. 171.

(*r*) *Brook v. Rawl*, 4 Ex. 521.

(*s*) *Halbronn v. International Horse Agency, &c.* (1903), 1 K. B. 270; *Dunlop Pneumatic Tyre Co. v. Maison and others* (1904), C. A. 20 T. L. R.

579.

CHAPTER V. requires to be stated with similar care and particularity to that which has hitherto been requisite in framing the declaration under the former practice: and so also with regard to the defence and reply. It has therefore been deemed advisable to retain in the text, most of the law and decisions upon various points relating to the pleadings in actions of Slander of Title under the former system; as many of them may be useful to the modern pleader in framing his pleadings under the new procedure.

The Slander must be precisely stated.

Slander of Title to Tulips.

It is necessary that the words spoken should be set forth precisely in the statement of claim, and there is no difference in principle as to this, whether the action is for slander in its ordinary form, or for slander of title. In a case in which the action was for slander of the plaintiff's title to some tulips, about to be offered for sale by public auction, the precise words used were not set out in the declaration; but merely the effect of them, alleging in general terms that the defendant wrongfully, injuriously, &c., asserted and represented in the presence and hearing of divers persons (naming them) that the said tulips were stolen property. On motion in arrest of judgment, the declaration was pronounced bad for not setting out the words *verbatim* (t).

Other necessary allegations.

In an action for Slander of Title to goods, it should, it seems, be alleged that the defendant *knew* that his claim was without foundation, or that there was an absence of reasonable and probable cause for making it (u).

Where it was alleged that by reason of the said slander divers persons, who were desirous of purchasing the *plaintiff's interest in the said premises*, were deterred from so doing: and it appeared from the evidence that the property was leasehold, and that the plaintiff did not offer for sale the whole of his interest, but merely the grant of an under-lease for the residue of an unexpired term: it was held, that the evidence did not support the declaration (x).

Allegations of Special Damage.

There must be an express allegation of some particular damage resulting to the plaintiff from such slander. The necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed; that is, whether it be through words, writing, or print: it rests on the nature of the action itself,

(t) *Gutsole v. Mathers*, 1 M. & W. 495; 1 Tyrw. & Gr. 694.

(x) *Millman v. Pratt*, 3 D. & R. 728; 2 B. & C. 486.

(u) *Wren v. Weild*, 10 B. & S. 51.

viz., that it is an action for special damage actually sustained, and not an action of slander (y). CHAPTER V.

The special damage alleged must appear on the face of the statement of claim to be the necessary or natural result of the facts therein alleged: if it only appear *inferentially* it will not be sufficient (z). And a legal right must be shown to have been invaded; with an intention to cause the damage alleged (a). Inferential damage will not support the action.

Where the plaintiff was tenant for life in possession of certain estates in Derbyshire and other counties, and the defendant had issued notices to the tenants requiring them to pay the rents to him as "the lawful heir to and owner of the estates"; the plaintiff having sued the defendant for trespass, interfering with the collection of the rents, and for slander of title; the defendant pleaded a denial of the trespass and justified his words and actions as *bonâ fide*, and without malice, and that they were spoken and done in furtherance of his claim to the estates, and alleging reasonable and probable cause. At the trial, the defendant having failed to substantiate his defence, judgment was given for the plaintiff, and an injunction granted restraining the defendant from slandering the title of the plaintiff (b). Justification to action for Slander of Title.

(y) *Malachy v. Soper*, 3 Bing. N. C. 385.

(z) *Haddon v. Lott*, 24 L. J. C. P. 49; 15 C. B. 411.

(a) *Day v. Brownrigg*, 10 Ch. D. 294; 48 L. J. 178; *Cune v. Golding*,

Styles, 169, 176; *Corcoran and wife v. Corcoran*, 7 Ir. C. L. Rep. 272; *Carr v. Duckett*, 5 H. & N. 783.

(b) *Leslie v. Cave*, 3 Times L. R. 584: per Kekewich, J. (affirmed on appeal, 5 *ib.* p. 5).

THE LAW OF LIBEL.

CHAPTER VI.

Libel, nature of the offence.

Recent authorities as to what constitutes a libel.

Distinction between oral and written slander.

Various imputations tending to the disparagement of character.

Libels expressed in indirect, satirical, or ambiguous language.

Libel by comparison with notorious persons.

Libel by dictation or request.

Libels affecting persons in their official capacity, profession, trade, &c.

Libels on tradesmen in relation to the goods they manufacture or vend.

Libels on newspaper proprietors.

As to the procedure against libellers.

Privilege as applied to defamatory publications.

CHAPTER VI. LIBEL, or written Scandal, is a species of defamation in its most aggravated form. A person who publishes defamatory matter in writing or in print, puts in circulation that which is more permanent and more readily transmissible than oral slander. The offence has always been treated as one of a more injurious nature than verbal defamation, by reason of the greater premeditation of the libeller in committing his words to writing; and the more durable and mischievous publicity which may thereby be given to them. And the law considers the publication of written slander (a) to be so deliberately mischievous in tendency, and injurious in consequences, as to be not only indictable as a public offence, but also to confer a substantive right of action, though no specific loss or damage can be proved.

How expressed. A libel may be expressed in various ways; as by printing, writing, sign, or picture.

By printing or writing, the libel may be contained on paper, parchment or other like substance, or in any book, letter, placard, pamphlet, newspaper, post-card, or printing or writing of any kind: so also if the writing be on any wall, paling, post (b) or pavement (c).

(a) In order to avoid repetition, under the term "written slander" are meant to be included all communications, by writing, printing, painting, or signs, as contradistinguished from those

which are merely oral.

(b) *Austen v. Culpepper*, Skin. 123; 2 Show. 314.

(c) *Haylock v. Sparke*, 1 E. & B. 471; 22 L. J. M. C. 67.

Libel, nature of the offence.

Indictable as well as actionable.

Without writing, it may be expressed by electric telegraph (*d*), picture, sign or type (*e*), as by burning in effigy, affixing a gallows or other reproachful or ignominious sign at a person's door (*f*); or by painting (*g*), or caricature (*h*); or by wood-cut or other print, engraving or photograph, whereby to exhibit a person in any shameful or disgraceful position, or in the company of disreputable persons (*i*).

It is not the mere writing or painting of the defamatory matter, but the publication or exhibition of it that makes it actionable (*k*), or indictable, as the case may be.

Probably the best and most generally recognised definition of a libel is that given by a very distinguished judge of the past century (*l*), who defined a libel as "a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule" (*m*). No man has a right, in any form of publication, to render the person or abilities of another contemptible or ridiculous: and therefore, where a publication is upon the face of it, injurious to the character of a person, it is a wrong from which malice will be inferred; and which makes it actionable whether any injury was intended or not (*n*). And so also as to any words in writing from which it may be inferred that misconduct is imputed, or which tend to bring a person into contempt, or to set other persons against him as one who has misconducted himself (*o*). And the publication, without lawful justification or excuse, of anything in writing which can by any reasonable construction be shown to be disparaging to the character of another may be libellous; and the plaintiff has a right to take the opinion of a jury upon it (*p*). But words that are innocent in their primary and natural sense, and such as would not be read by any reasonable person as conveying a libellous imputation upon the plaintiff, are not actionable (*q*).

Recent authorities as to what constitutes a libel.

(*d*) *Whitfield and others v. S. E. Ry. Co.*, E. B. & E. 115.

(*e*) *Du Bos v. Beresford*, 2 Camp. 511.

(*f*) 5 Co. 125; Hawk. P. C. Book 1, cap. 28; *Jefferies v. Duncombe*, 11 East, 226.

(*g*) 11 Mod. 99, per Holt, C.J.

(*h*) *Carr v. Hood*, 1 Camp. 355 n.

(*i*) 5 Co. 125; Skin. 123; Raym. 431; 3 Keb. 378; 2 Show. 314.

(*k*) *Lamb's Case*, 9 Rep. 59; *Hebditch v. MacIlwaine and others* (1894) 2 Q. B. 54; 63 L. J. 591.

(*l*) Baron Parke, afterwards Lord Wensleydale.

(*m*) 6 M. & W. 108; and see 15 M. & W. 437.

(*n*) *Chalmers v. Payne*, 2 C. M. & R. 157.

(*o*) *Hoare v. Silverlock*, 12 Q. B. 33; 17 L. J. Q. B. 306.

(*p*) *Fray v. Fray*, 34 L. J. C. P. 45; 17 C. B. (N. S.) 603; and see *Cox v. Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219.

(*q*) *Cap. & Counties Bank v. Henty and others*, 7 App. Cas. 741.

CHAPTER VI.

Why libel is
classed among
criminal
offences.

Libel is ranked among criminal offences because of its supposed tendency to arouse angry passions, to provoke revenge, quarrels, duels, and assaults; and thereby to endanger the public peace. But the libeller is not the less liable to an action-at-law at the suit of the person libelled. Words, which are frequently the effect of a sudden gust of passion, may soon be buried in oblivion; but slander when committed to writing shows that the author is actuated by more deliberate malice, and is thereby the more provoking. And, "written slander thereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and farther than any other scandal" (r).

Distinction
between oral
and written
slander.

A scandalous libel in writing is, when an epigram, rhyme, or other writing, is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. Thus in the case of *Cropp v. Tilney* (s), Lord Holt, C.J., said that scandalous matter was not necessary to make a libel, that it was enough if the defendant induced an ill opinion to be had of the plaintiff, or made him contemptible and ridiculous. So according to the doctrine laid down in *Villars v. Mousley* (t), the publishing any thing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, is actionable. And therefore, to publish in writing of another that he is a rogue, rascal, swindler, or villain (u), is actionable, although neither of those terms would be actionable if merely spoken.

In the case of *Sir J. Austen v. Col. Culpepper* (x), the defendant had forged an order of the Court of Chancery, containing many defamatory reflections upon the plaintiff, and at the bottom had drawn the form of a pillory, and subscribed to it the words, "For Sir J. Austen and his witnesses by him suborned." It was contended that the action was not maintainable, since no certain slander was imputed by the words; and that if the words would not support the action, the representation could not, since it was not to be inferred that the parties were perjured; and that though for setting up horns, &c., for the purpose of ridicule, an indictment would lie, yet that no action was maintainable; but the court held that an

(r) 5 Bac. Abr. 194; 5 Co. 125; Ld.

Ray. 416; 12 Mod. 219.

(s) 3 Salk. 226.

(t) 2 Wils. 403.

(u) *Bell v. Stone*, 1 Bos. & Pul. 331.

(x) *Skinner*, 123; 2 Show. 314.

action in such cases was maintainable, as well as an indictment, and referred to the case of *King v. Lake* (y), where the plaintiff had judgment in the Exchequer. And the court added, that to say of any one that he is a dishonest man, would not be actionable, but to publish it or put it on the posts would be actionable; and the plaintiff had judgment. In *Bradley v. Methwyn* (z), which was an action on the case for libel, Lord Hardwicke, C.J., observed, that "The present case is not for words, but for a libel, in which the rule is different, for some words may be actionable or prosecuted by way of indictment, which would not be so if spoken only; for the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace, by making the scandal more public and lasting, and spreading it abroad, which was determined in this court in the case of *King v. Griffin*" (a).

Whatever of doubt might, notwithstanding previous authorities, seem still to have attached to this question, was removed by the decision in the Exchequer Chamber, in the case of *Thorley v. Lord Kerry* (b). Lord Kerry (the plaintiff below and defendant in error), founded his action upon a libel, charging him with being a hypocrite, and having used the cloak of religion for unworthy purposes. He obtained a verdict with £20 damages, and had judgment in the King's Bench without argument. A writ of error was brought in the Exchequer Chamber, and after very able arguments, in which all the previous authorities were considered, judgment was finally given for the defendant in error. Sir J. Mansfield, C.J., in delivering the opinion of the court, stated that the words, had they merely been spoken, would not have been actionable; and after expressly repudiating any distinction in principle between oral and written scandal, intimated that the judgment of the court in favour of the defendant in error, was founded entirely on the previous authorities, which established a Rule too inveterate to be overturned; viz., that "although the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies." In a subsequent case, it was held, that to publish, in writing, of an archbishop,

Words in writing actionable, though not so if merely spoken.

(y) 2 Vent. 28.

(a) Hil. 7 G. 2.

(z) Selwyn's Ni. Pri. B. R. M. 10

(b) 4 Taunton, 355.

G. 2, MSS.

CHAPTER VI.

that he had attempted to convert a Catholic priest to become a Protestant clergyman, by offers of money and preferment, was actionable; and Best, C.J., after observing, that in *Kerry v. Thorley*, the distinction between oral and written slander had been established too firmly to be shaken said, "According to that case, in order to support an action for oral slander, something criminal must have been imputed; but in a libel, any tendency to bring a party into contempt or ridicule is actionable, and in general any charge of immoral conduct, although in matters not punishable at law" (c). The rule is also well illustrated in the case of imputations of immorality and unchastity in females. Until recently (d) no action would lie for verbal imputations of the kind, however virtuous and respectable the woman upon whom they were made might be; unless special damage could be sustained. But any such imputations published in writing were actionable without proof of special damage.

Illustrations of the Rule.

Various imputations tending to the disparagement of character. Charges of inhumanity.

Hypocrisy.

Insulting Females.

Swindler, &c.

Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous (e). And accordingly, it is libellous to publish and charge a man, (by writing,) with a want of honesty, civility, humanity, veracity, or gratitude (f): such charges being calculated to bring a man into contempt. And so also to charge a man with being a hypocrite, and having used the cloak of religion for unworthy purposes (g). And a man may be guilty of a libel in imputing dishonourable conduct to another, though not involving a breach of any positive law (h). So it is libellous to publish in writing, of a man that he has been guilty of gross misconduct and has insulted females in a barefaced manner (i).

Where the action was for publishing in a newspaper, that "The plaintiff was at the head of a gang of swindlers, a common informer, and had been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions" (k): the plaintiff demurred, specially, on account of the generality of the defendant's plea, and judgment having

(c) *Archbp. Tuam v. Robeson*, 5 Bing. 17, 21.

(d) 1891, *supra*, p. 44.

(e) *Cropp v. Tilney*, 3 Salk. 226, per Lord Holt, C.J.

(f) See *Villars v. Mousley*, 2 Wils. 403; *F Anson v. Stuart*, 1 T. R. 748; Ray. 201; *Cox v. Lee*, L. R. 4 Ex. 284.

(g) *Thorley v. Lord Kerry*, 4 Taunt. 355.

(h) 11 C. B. 125, per Jervis, C.J.

(i) *Clement v. Chivis*, 9 B. & C. 172.

(k) *F Anson v. Stuart*, 1 T. R. 748; and vide *Hewson v. Cleeve* (1904), 2 K. B. D. (Ir.) 536.

been given for the defendant below, the plaintiff carried the matter, by writ of error, into the Court of King's Bench, where the same causes were assigned for error, which before had been alleged as grounds of special demurrer. The defendant further contended, that the declaration was insufficient, as the words "common informer" were not actionable, and the term "swindler" was not a legal term of which the law could take notice. But Buller, J., observed, "The objection afterwards taken to the declaration is, that the term 'swindler' is too general, and cannot be legally understood, but Mr. Justice Aston formerly held otherwise, for he said that the word 'swindler' was in general use, and that the court could not say they were ignorant of it. But at all events we cannot say upon this record, that we do not understand the import of it, for it is explained to be 'defrauding divers persons.' The declaration contains as libellous a charge as can well be imagined."

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A society had been formed called "The Society for the protection of Trade against Swindlers and Sharpers." By its rules all fair traders were admissible. The secretary sent round a circular to the members, in which he stated, that the plaintiff (and two other persons whom he named) were reported to that society as improper to be proposed to be ballotted for as members thereof. It was proved that the circular was understood to import that the plaintiff was connected with swindlers. It was ruled by Lord Tenterden, C.J., that, without the slightest doubt, such a publication was libellous, however cautiously worded; and that no proof of special damage was necessary (*l*). But on motion in arrest of judgment, it was held, that the matter charged as libellous was not sufficiently connected with the introductory matter, and that without such matter the words were not in themselves actionable (*m*). But the court observed, that had they been so connected, there could be no doubt that the action would have been maintainable.

Imputation of
being connected with
swindlers.

An imputation of cheating at cards, though conveyed in an indirect manner, and published in a newspaper, is libellous (*n*).

Cheating at
cards.

(*l*) *Goldstein v. Foss and another*, 2 C. & P. 252.

(*m*) *Ibid.* 6 B. & C. 154, affirmed in Ex. Cham. 4 Bing. 489. It will be observed that this is one of those cases

prior to the C. L. P. Act, in which the action was defeated on a technical point of pleading.

(*n*) *Digby v. Thompson and another*, 4 B. & Adol. 821.

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To write and publish of a person who sought admission to a 'Black-balled' club, that he was "black-balled," and "bolted" next morning without paying the debts contracted by him with divers persons, is libellous (o). But to say that a person "quitted" the neighbourhood leaving divers of the tradesmen to whom he owed money unpaid, would not be so (p). And where the defendants posted up in a public room, the following notice—

Notice of exclusion from a public room. "The Rev. J. Robinson (the plaintiff) and Mr. J. K., inhabitants of this town, not being persons that the proprietors or annual subscribers think it proper to associate with, are excluded this room"; it was held, that the publication was not actionable, on the ground that it did not represent the plaintiff as an improper person for *general society*, but merely asserted the opinion of certain parties (q).

Imputation that, not a proper person to be entertained in society.

Where, in an indictment containing several counts for libels on the Duke of B., published in *The Satirist* newspaper; the libel alleged in the 8th count was:—"Why should Theophilus be surprised at anything Mrs. W. of Connaught Place does? If she chooses to entertain the Duke of B., she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all the expatriated foreigners who crowd our streets to her table, if she thinks fit." It was held, by a large majority of the Court of Exchequer Chamber, that the matter complained of in the 8th count was libellous, as it might be understood in such a sense as to be injurious to the prosecutor's character (r).

Master wrongfully writing upon Cab-drivers' licence.

And it has been held, that an action lies by a cab-driver against his master for wrongfully and unjustly defacing his licence as a driver (granted to him under the statute 6 & 7 Vict. c. 86, s. 21) by writing upon it that he was not a fit and proper person to act as driver of a hackney carriage (s). For an employer cannot adjudicate on his own complaint, by writing upon the licence that which the Act of Parliament authorises the justice alone to indorse.

The like upon an Omnibus Conductor's licence.

And where it was alleged that the defendant, who employed the plaintiff as conductor of a metropolitan stage carriage, wrongfully and maliciously wrote upon the plaintiff's licence, "Discharged for being 1s. 4d. short"; whereby he was prevented from obtaining employment: it was held, on demurrer,

(o) *O'Brien v. Clement*, 16 M. & W. 159.

(p) *Ibid.* 168.

(q) *Robinson v. Jermyn and another*, 1 Price, 11.

(r) *Gregory v. The Queen*, 15 Q. B. 973.

(s) *Hurrell v. Ellis*, 2 C. B. 295; and see *Taylor v. Rowan*, 1 Moo. & Rob. 490.

that the declaration disclosed a good cause of action ; and a plea professing to justify the act on the ground of truth, and that the plaintiff had defrauded the defendant, was held no justification (t). CHAPTER VI.

And where the plaintiff sued the defendant for the publication, in a newspaper, of a falsehood respecting the plaintiff's business ; the statement was not in itself defamatory and not actionable as a personal libel ; but the plaintiff proved a general loss of business as the direct and natural consequence of the publication ; and it was held, that the action was maintainable : and that, in an action for falsehood such as in its very nature is intended or reasonably likely to produce damage to a man's trade, and which in the ordinary course of things does produce a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible in support of the action (u). Publication in newspaper of falsehood producing damage to Trader's business.

To write and publish of another, that he is a " black-sheep " or a " black-leg," is libellous (x). So also to impute to a newspaper proprietor, that, in putting forth to the public, in his newspaper, the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper (y). And so also to impute to a person that, with a view to induce others to contribute towards a professed cause, he published a fictitious subscription list (z). So also to charge a recipient with the improper use of benevolent contributions (a). So also to charge a person with circulating abusive circulars because such a charge carries with it a certain amount of damage to a person's character (b). 'Black-sheep.'
'Black-leg.'
'Impostor.'
Imputation of circulating abusive Circulars.

A statement in writing, that a person's mind is affected, is *primâ facie* a libel (c). Insanity.

Where a letter was addressed to the clerk to the guardians of a Poor Law Union, as to an allowance by such guardians towards the maintenance of a female pauper, expressing doubts as to the poverty of such pauper, and imputing that the plaintiff, the daughter of such pauper, was able to contribute towards her mother's maintenance ; that she was " a lady of Other imputations tending to disparage character.

(t) *Rogers v. Macnamara*, 14 C. B. & S. 769 ; 32 L. J. Q. B. 185.

27. (z) *Ibid.* 3 B. & S. 776.

(u) *Ratcliffe v. Evans* (1892), 2 Q. B. (a) *Hoare v. Silverlock*, 17 L. J. Q. B. 308.

(x) *McGregor v. Gregory*, 11 M. & (b) *Ibid.* 12 Q. B. 624.

W. 287. (c) *Morgan v. Lingen*, 8 L. T. N. S.

(y) *Campbell v. Spottiswoode*, 3 B. 800.

CHAPTER VI. independence and a single woman, and could find money for carrying on all sorts of law proceedings." "That she had for years, without the slightest cause, systematically done everything she could to annoy the defendant" (her sister). "That the plaintiff and her mother had some years ago dragged her into Chancery, and compelled her, almost every term, to appear by counsel before the Vice-Chancellor. That they had no business to include her in the bill; but that it was a pleasure to them to put the defendant to all the expense they could;" it was held, on demurrer, that the publication of such letter tended to disparage the plaintiff's character, and was therefore libellous (*d*).

Charge of
Ingratitude.

A charge of ingratitude, published in a newspaper, is libellous; and, notwithstanding that facts be stated as the ground of the charge which do not support it, it is still a question for the jury, whether the words were used under such circumstances as to make them libellous (*e*).

Of having been
in pecuniary
difficulties.

An untrue statement, published in a newspaper, that a person was at a past time in pecuniary difficulties, may be libellous, although it is also stated that those difficulties have been surmounted (*f*).

'Man of
Straw.'

To write and publish of another that he is a "man of straw," is libellous, when taken in connection with other parts of the communication showing an intention on the part of the writer to convey an imputation of insolvent circumstances (*g*).

Of religious
intolerance.

Where a letter, published in a newspaper, imputed to the plaintiff, a Presbyterian in religion, gross intolerance in refusing the use of his hearse for the funeral of his deceased servant, because the body was to be interred in a Roman Catholic burying ground; it was held, on demurrer, by the Court of Exchequer in Ireland, that the Court could not so clearly see that the letter could not in any view be libellous, as to justify them in withdrawing the case from a jury (*h*).

Fraud in
horse-racing.

To impute fraudulent conduct to another in horse-racing and betting transactions, is libellous; and this whether or not the transactions are strictly legal (*i*). To impute to another in a newspaper (through the editor) that he has poisoned foxes

Of poisoning
Foxes.

(*d*) *Fray v. Fray*, 17 C. B. (N. S.) 603; 34 L. J. C. P. 45.

(*e*) *Cox v. Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219.

(*f*) *Ibid.* per Kelly, C.B.

(*g*) *Eaton v. Johns*, 1 Dowl. P. C. (N. S.) 602.

(*h*) *Teacy v. McKenna*, Ir. R. 4 C. L. 374.

(*i*) *Greville v. Chapman and others*, 5 Q. B. 731; 13 L. J. Q. B. (N. S.)

172; and see *Wood v. Durham*, *infra*.

in a county in which fox-hounds are kept, and has been hung in effigy for so doing, has been held libellous (*k*). CHAPTER VI.

So also to publish in a newspaper, a story calculated to bring a person into public ridicule, although such person may have previously told the story of himself (*l*). Libel by story of ridicule.

It is a libel to publish in a newspaper, of a married man, that his conduct towards his wife was so cruel that she was compelled to resort to a Criminal Court for protection (*m*). Libel of husband by imputation of cruelty to wife.

Imputations of unchastity and immorality, when published in writing, are libels (*n*). In general any charge of immoral conduct published in writing is a libel (*o*). And damages to the amount of £2,000 were recovered in an action against the proprietor of a newspaper, for a libel upon a married lady, wherein she was accused of criminal connexion with a naval commander abroad (*p*). And where a statement was published in a newspaper, as a "rumour," of a married lady, that she had committed adultery; the court granted a criminal information against the publisher of the newspaper (*q*). And so also, for a libel on a deceased lady, the wife of a baronet, imputing adultery to her with one of her menial servants (*r*). Libel by imputation of immorality, unchastity, &c., or adultery; on a deceased lady.

If matter defamatory of a living person be published, by casting reflections on the conduct of his deceased father, imputing fraud and dishonesty in the public offices he held, and that out of the proceeds of that fraud the son was enabled to become a colonel of militia, such may be a libel on the son; and he has a right to take the opinion of a jury upon it (*s*). Libel on an officer of militia, by reflections on his deceased father.

A man may be as successfully exposed to ridicule by a caricature painting or drawing, as by any written misrepresentation; and the object of the defendant may be as clearly manifested in the latter as in the former. The difficulty, indeed, of proving the plaintiff to be the person aimed at, may, in some instances, be greater in the latter case; but when the doubt as to the defendant's application of the calumny has been Libel by Pictures and Caricatures.

(*k*) *Reg. v. Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206. And see *Foulger v. Newcomb*, 36 L. J. Ex. 169.

(*l*) *Cook v. Ward*, 6 Bing. 409.

(*m*) *Hakewell v. Ingram*, 2 C. L. Rep. (1854), p. 1397.

(*n*) *Rea v. Benfield and another*, 2 Burr. 980, 985.

(*o*) 5 Bing. 21.

(*p*) *Webster and wife v. Baldwin*, H. T. 1816, Com. Pl. N. P. And a case is mentioned in 3 Christ. Blac.

126, of a young lady recovering £4,000 damages for reflections upon her character, published in a newspaper.

(*q*) *The Queen v. Leng*, M. T. 1870; and see *The Queen v. Yates*, *infra*.

(*r*) *The King v. Weaver and others*, *infra*, "Libels Reflecting on the Memory of the Dead."

(*s*) *White v. Tyrrell*, 5 Ir. C. L. R. 498, and *vide infra*, Criminal Division, Libels on the Dead.

CHAPTER VI. overcome, there seems to be no room for further distinction.

The pencil of the caricaturist is frequently an instrument of ridicule more scurrilous and pungent than the press; and it is not easy to conceive an imputation which an ingenious artist would not be able successfully to communicate to minds of even the meanest capacity (*t*). In legal consideration, the only question is, whether the mode of defamation which has been adopted be capable of conveying that meaning which is detrimental to the plaintiff? If, in fact, such modes be equally capable of so doing, equally distributable, and equally durable,—in short, equally mischievous in every respect,—they cannot be considered as distinguishable, for legal purposes, upon any principle of reason and good sense; and no such distinction is to be found in the reports.

Libels expressed in indirect, satirical, or ambiguous language.

Having thus far described, generally, the nature of libellous communications made in a direct or undisguised manner, it should now be shown that libellous matter may be equally mischievous though conveyed in an indirect, ambiguous, or other covert mode of expression.

A libellous imputation may be conveyed either directly or indirectly: directly, when the party libelled is distinctly named in the publication, or is otherwise alluded to in such a manner that it obviously applies to him: indirectly, when the name of the party libelled does not appear in the publication; or when the libel is ambiguously worded, expressed ironically, or otherwise shrouded in satire, slang, or other subtle mode of insinuation; for although the sting of the libel be sheathed in the mode of expression, it may be equally mischievous when brought out to the understanding of those who see or read it, or to whom it is otherwise published.

Covert insinuation.

And so it has been held that it is not only scandal in writing expressed in a direct and open manner that amounts to a libel, but also that which is expressed in irony, by insinuation, or other less open and direct means (*u*); for the law is never to be defrauded on account of the mystery of the satire. Indeed, the coward-slanderer who slyly and covertly attempts by allegory, hint, or subtle insinuation, to deprive his neighbour of his good name and reputation, is generally more culpable than the open defamer.

Libel by hypothesis.

The respondent, a member of parliament, having asked a question in the House of Commons implying that one C. had

(*t*) *Vide infra*; Criminal Division, (u) Hob. 215; Poph. 139; 11 Mod. "Publications exciting to an illegal act." 86, pl. 5.

been guilty of improper conduct; C. wrote to the respondent, complaining of the imputation upon his character; and by way of retort and hypothesis, stated in one of his letters—"Supposing, for example, I sent a question, based on hearsay evidence, to the effect that you were on a certain occasion in a state of *delirium tremens*." C. afterwards sent his letters for publication in a newspaper. In an action of libel against the appellants, the proprietors of the newspaper; it was held (affirming the judgment of the court below) that the words were reasonably capable of a libellous construction, which was therefore a question to be decided by a jury (x).

A defamatory publication in hieroglyphics is as much a libel, and as highly punishable, as an open invective. If it be really unintelligible, it will pass for nonsense with every one; but if there be only a thin veil or awkward disguise thrown over it, through which those who can see and observe, may perceive the satire within; a court of law, aided by a jury, will examine and judge of it according to the intention of the maker, and the influence it may have upon the injured party's reputation. As scandalous words, if they be spoken in an unknown tongue, which none of the auditors understand, will not bear an action, because they do no injury (y); yet if they be understood by the bystanders, are actionable. So in the case of libels; if the world understand them to be such, the law will make the same construction; but if the satire be not commonly understood, the law will not punish it (z).

From this ground, it appears that not only an allegory, but a rebus and anagram, which are still more difficult to be understood, may be libellous; and a court and jury are allowed to judge of their meaning as well as other readers (a).

If the libel be expressed in ambiguous language so that it is doubtful whether it imputes anything injurious to the plaintiff, the proper question for the jury is, not whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter published be injurious to him (b); for a person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act. And in an action for a libel published in a newspaper, if the language is

(x) *Ritchie & Co., App., and Sexton, Resp.*, 64 L. T. 210, 55 J. P. 389. 2 Sess. Cas. 29 Pl. 33; 5 Bac. Abr. tit. Libel, 199.

(y) *Danv. Abr.* 146, pl. 1.

(z) *Holt's L. L.* 235 (2nd ed.).

(a) *Ibid.*; and *vide R. v. Edgar*,

(b) *Fisher v. Clement*, 10 B. & C. 472.

By Hieroglyphics and Satire.

Libel by Rebus or Anagram; or in illiterate language.

Libels ambiguously worded.

CHAPTER VI. ambiguous as to the nature of the offence imputed, other passages in the same newspaper, by the same person, are properly admissible in evidence for the purpose of removing such ambiguity (c).

Libel by initials.

And it is no protection to a libeller that the names of the persons libelled were not published, but only the first and last letters of their names (d) : or, merely their initials (e).

Libels in ironical language.

Where the libel complained of was a paragraph in a newspaper, headed,—“An Honest Lawyer,” and then followed an imputation upon the plaintiff of “sharp practice.” By innuendo the term was pointed as implying a *dishonest* lawyer, who had been guilty of sharp practice and unprofessional conduct; and the declaration was held good (f).

Libel in slang terms.

A writing in which fraudulent or dishonourable conduct is imputed in slang terms, such as are usually applied to a person who keeps an illegal or disreputable house, is libellous, whether the words refer to specific charges or not (g).

In the form of a dialogue.

A libel may be contained in a publication purporting to set forth a dialogue between two persons; if the tendency of the publication be to hold up the plaintiff to ridicule and contempt. As in a case where the publication was in the form of a dialogue as to a previous action for libel, in which a plaintiff had recovered damages; insinuating that the libel was, nevertheless, true (h). For, if a man *insinuates a fact* in asking a question, meaning thereby to *assert it*, it is the same thing as if he asserted it in terms. A learned judge, in leaving a case of this kind to the jury, directed them as follows:—“If you think that the defendant by asking the questions here put, meant to insinuate, and to state, that ‘*infants are born in the Nunnery at Scortum, and that Holy fathers bring them up or murder the innocents,*’ then it is a libel on those persons” (i).

Libel by Question and Insinuation.

And it is also libellous to compare a person, or his transactions, with those of any odious, notorious, or disreputable persons: and this too although such persons be merely fictitious characters introduced in a work of fiction; as in a case, where it was held to be a libel to impute to a solicitor that in

Libel by comparison with notorious persons.

(c) *Bolton v. O'Brien*, L. R. (Ir.), 446.

16 Q. B. D. 109.

(d) *The Queen v. Hurt*, Dig. Law of Lib. 7 by “A Gentleman of the Inner Temple” (A.D. 1765).

(e) *Roach v. Read and another*, 2 Atk. 469.

(f) *Boydell v. Jones*, 4 M. & W.

(g) *Digby v. Thompson*, 4 B. & Adol. 821; 1 Nev. & Man. 485.

(h) *Fisher v. Clement*, 10 B. & C. 472.

(i) *Reg. v. Gathercole*, 2 Lew. C. C. 255. Per Alderson, B.

certain of his professional transactions "Messrs. Quirk, Gammon, and Snap (*k*) were fairly equalled if not outdone" (*l*). CHAPTER VI.

The defendant published in a newspaper under the heading "Parochial matters at Eversley," a letter in which she referred all readers to the Primate's speech in the House of Lords on the Clergy Discipline Act; which speech contained serious allegations against an unnamed clergyman: the plaintiff, who was rector of Eversley, believing that the defendant thereby sought to attach the defamatory statements in the said speech as applying to him, brought an action of libel against her: it was held to be a question for the jury whether the defendant meant that the passage in the Primate's speech referred to the plaintiff, and whether by referring to it as she did she meant to apply it to the plaintiff; and that if she did, it amounted to a publication of a libel by the defendant upon the plaintiff (*m*).

Likening persons to certain animals, or speaking of persons in figurative terms may be libellous; and it is not necessary to add innuendoes to explain the meaning of allegorical expressions that are well known and well understood; such as imputing to a person the qualities of the "frozen snake" in the fable (*n*). Libel by Figurative or Allegorical Expressions.

A person may be liable for the publication of a libel by dictating the contents thereof to another, for the purpose of publication. If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanour, and is therefore responsible as a principal. A man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state: having directed a libel to be published of a particular person, on a particular subject, and afterwards approved of what is published, he cannot then defend himself on the ground that something has been added which he did not authorize or communicate; although the writer of the libel may have heard the story before the other related it to him (*o*). Libel by Dictation, or request.

(*k*) See Warren's "Ten Thousand a Year"; a well-known tale of fiction, in which a notorious firm of solicitors, called "Messrs. Quirk, Gammon, and Snap," are represented as setting up a false and fraudulent claim to an estate.

(*l*) *Woodgate v. Rideout*, 4 F. & F. 202, per Cockburn, L.C.J.

(*m*) *Lawrence v. Newberry*, 64 L. T. 797; 39 W. R. 605.

(*n*) *Hoare v. Silverlock* (No. 1), 12 Q. B. 632; 17 L. J. Q. B. 308.

(*o*) *Reg. v. Cooper*, 8 Q. B. 533.

Libel originating with Plaintiff himself.

CHAPTER VI. to make a man ridiculous, that he himself told the same story to a party of friends (*p*).

Libels affecting persons in their official capacity, profession, trade or business.

As to libels which touch a man in his office, profession, or trade, the same rule applies to written as to parole slander (*q*). At Common Law an action lies for words which slander a man in his trade, or defame him in an honest calling. And if actions lie for mere words of this description, *à fortiori*, they may be maintained when the words are rendered more extensively and permanently mischievous by writing.

There is, however, this important distinction, that, whilst an action on the case only is given for verbal slander affecting a man in his profession, an indictment will lie for the same slander when written; from its tendency to provoke a breach of the peace. It is evident moreover, from the authorities, that words *written* of a man, tending to disparage him in his profession, will support an action, although the same words when *spoken* would not. There is also this further distinction, that, for the *slander* of a person in his office, profession, or trade, the action cannot be supported unless the party slandered be in the enjoyment of such office, &c., at the time the slander is uttered. But in *libel* it is different, and, notwithstanding that the person libelled is not then in the actual enjoyment of his office, trade, or business, still the action may be maintained: as in a case where it was held, that although an attorney had retired from his profession, and taken his name off the Roll of Attorneys, yet if it be published of him that whilst an attorney he was guilty of "sharp practice," the action might be sustained (*r*).

General rule.

The general rule is, that where the libel affects a person in his official capacity, profession, trade, or business, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof, an action will lie without proof of actual malice or of special damage (*s*). But the libel must clearly appear to apply to the plaintiff with reference to his office, profession, trade, or business; and this may be shown either by the libel itself, or by the evidence. And although the trade or calling of the plaintiff is not one of which the court can take judicial notice, still (unless it be an illegal calling) if it be shown that the defamatory matter was published of the plaintiff

(*p*) *Cook v. Ward*, 6 Bing. 409.

(*q*) *Supra*, Chap. III.

(*r*) See *Boydell v. Jones*, 4 M. & W.

450.

(*s*) *Ingram v. Lawson*, 6 Bing.

N. C. 212; 8 Scott, 471.

with reference to that trade or calling, the action may be maintained (t). CHAPTER VI.

Defamatory words, whether written or spoken, imputing to partners in trade that they carry on their business fraudulently and contrary to law, are actionable; and such partners may sue jointly (u). But in a joint action for a libel by two partners (bankers), damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business (x). A libel may be contained in a mercantile communication made by one firm to another abroad, reflecting on the mode of business of a third party (y). And although the letter which forms the subject of the libel should not reach the person to whom it is addressed, that is no answer to an action for a libel contained in such letter, at the suit of the person libelled (z). Libels of Partners in trade.

An action may be maintained for a libel on an insurance company, as a libel on the partnership in the way of its business, by attacking the mode in which that business is conducted; or by imputation that the company are in the practice of holding forth to the public, hopes that are never meant to be realized (a). And a joint-stock company duly incorporated, may maintain an action for libel against a shareholder of the company (b). Libel on a Company.

A publication in a newspaper, conveying an imputation on a provision merchant of supplying bad and unwholesome water to a ship, whereby the passengers were made ill, is libellous (c). So also an imputation on the keeper of a house of public entertainment, that his licence for music and dancing has been refused by the magistrates (d). But it has been held, on demurrer, to be no libel to write and publish of a physician (in a newspaper) that he has met homœopathists in consultation; though it be alleged, that in the opinion of the profession, meeting homœopathists in consultation Imputation of supplying bad water to a ship:

(t) *Foulger v. Newcomb*, 36 L. J. Ex. 169; L. R. 2 Ex. 327; see *Hunt v. Bell*, 1 Bing. 1; *Yrisarri v. Clement*, 3 Bing. 432.

(u) *Le Fanu v. Malcomson*, 1 H. L. Ca. 637.

(x) *Haythorn and another v. Lawson*, 3 Car. & P. 196, per Gaselee, J.

(y) *Ward and another v. Smith*, 6 Bing. 749.

(z) *Clegg v. Laffer*, 3 Moore & Sc.

728.

(a) *Williams v. Beaumont*, 10 Bing. 269; 3 Moore & Sc. 722.

(b) *Metropolitan Saloon Omnibus Company v. Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201.

(c) *Solomon v. Lawson*, 8 Q. B. 823; 15 L. J. Q. B. (N. S.) 253.

(d) *Bignell v. Buzzard*, 3 H. & N. 217; 27 L. J. Ex. 355.

CHAPTER VI. would be a breach of professional etiquette, and injurious to the professional character, reputation, and practice of a physician (e).

Quackery to an Optician. To impute to an optician, by advertisement in a newspaper, that he is "a licensed hawker, and a quack in spectacle secrets," is libellous (f).

Libel on a Public Vocalist. Where the defendant having engaged the plaintiff, a public vocalist, to sing at a concert, placed her name in an inferior position to that of other *artistes* on the programme of the concert; in an action of libel for the injury thereby done to her reputation, the Court of Appeal upheld the verdict of the jury for the plaintiff (g).

Libel on a Tradesman in relation to his inventions. Where the plaintiff declared that he was gunsmith to His Royal Highness the Prince of Wales, and that, it having been inserted in the *Craftsman* newspaper that he had the honour to present His Royal Highness with a gun he had invented, of two feet six inches long, which would shoot as far as other guns a foot longer; the defendant published an advertisement that "Whereas there was an account in the *Craftsman* of John Harman, gunsmith, making guns of two feet six inches, to exceed any made by others of a foot longer (with whom it is supposed he is in fee); this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment (except out of a leather-gun), as any gentleman may be satisfied of at the *Cross-Guns* in Long Acre." It was moved in arrest of judgment, that this was no libel; and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way; and the court held, that if the defendant had gone no farther than that, he would not have been chargeable; it might be lawful for other tradesmen to advertise that they made guns as good as he, but they ought not to say he is no artist, which they plainly did, by saying that he dared not engage with any artist, and by advising gentlemen to be cautious of him: that the law had always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade would bear an action, which would not be actionable in the case of private persons: and if bare words were so, it would be stronger in

(e) *Clay v. Roberts*, 9 Jur. (N. S.) 1 F. & F. 559.
580.

(g) *Russell v. Notcutt* (1896), 12 Times L. R. 195.

(f) *Keyzor and another v. Newcomb*,

the case of a libel in a public newspaper, which is so diffusive (*h*). CHAPTER VI.

And publications falsely and maliciously disparaging articles and goods which a tradesman manufactures, or vends, are actionable if special damage ensues. But an imputation that the goods of a tradesman are bad, is not actionable, if made *bonâ fide* and in truth. Nor is a public caution, inserted in a newspaper, imputing that a certain invention is different to what the inventor represents it to be; unless falsely and maliciously made (*i*). But if the imputation were against the plaintiff as a manufacturer, or a tradesman, to the effect that he is in the habit of manufacturing or selling goods which he knows to be worthless, or bad, it would be a libel upon him personally (*k*); and this case shows the distinction between an imputation on the *goods* of a tradesman, which is not actionable without special damage; and an imputation on the tradesman, personally, which may be actionable though no special damage be proved.

Libels on Tradesmen in relation to the goods they manufacture or vend.

And accordingly no action will lie for an imputation (whether by advertisement or otherwise) to the effect that the commodities of a certain tradesman are of an *inferior quality* to those of another; although the imputation be untrue and special damage be alleged (*l*). It has, however, been held on demurrer, that to print and publish of a tradesman, falsely and without lawful occasion, that the goods in which he trades are inferior in quality to similar goods in which his rivals trade, is actionable if special damage result (*m*).

Disparaging statements by rival traders as to commodities of others.

Where the jury found that the words complained of were not only a disparagement of the plaintiffs' goods, but were also defamatory of the plaintiffs in their business; and were published maliciously, the verdict of the jury was upheld (*n*). But a mere puffing, or statement, by a trader that his own goods are superior to those of another trader, even if untrue

(*h*) *Harman v. Delany*, 2 Str. 898; 1 Barnardiston, 289 and 438; and see *Jenner v. A'Becket*, L. R. 7 Q. B. 11.

(*i*) It has been held in an American case, that fair and reasonable comments, however severe in terms, may be published in a newspaper concerning anything which is made, by its owner, a subject of public exhibition; and are privileged in the absence of actual malice. *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. R. 322.

(*k*) *Evans v. Harlow*, 5 Q. B. 624; 13 L. J. Q. B. (N. S.) 120.

(*l*) *Young and others v. Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6.

(*m*) *The Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 43 L. J. Ex. 171; L. R. 9 Ex. 218.

(*n*) *Linotype Co. (Apprs.) and British Empire Typesetting & Co. (Resps.)*, 15 T. L. R. 524 (H.L.) affirming judgment of C.A., and the ruling of Lord Russell, L.C.J., at Nisi Prius.

CHAPTER VI. and the cause of loss to the other trader, gives no cause of action (o). But where there is proof of special damage traceable to a wrongful imputation upon the goods of a trader, and that imputation is made maliciously, a cause of action arises (p).

In the absence of proof of special damage, malice of the defendant, and that the statements published are untrue, the action cannot be sustained (q).

Charge of foisting a fictitious article upon the public.

Where the defendants, who were manufacturers of cattle food, issued an advertisement in various newspapers, and a circular to their customers, warning them against the course pursued by the plaintiffs (who were also manufacturers of cattle food) "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley;" both advertisement and circular were held to be libels on the plaintiffs, in the way of their trade, and calculated to do them injury in their business, as imputing that they were foisting a fictitious article on the public (r).

But where the plaintiff was the proprietor of a special food for infants, which he sold in bottles enclosed in wrappers bearing the words "Mellin's Infant's Food," the defendant, a chemist, was in the habit of selling the plaintiff's food to the public, but being himself the proprietor of another food called "Dr. Vance's Food for Infants and Invalids," he pasted on to the wrappers of Mellin's food, labels asserting the superiority of Dr. Vance's food to all others. In an action for libel upon the plaintiff's goods and claiming an injunction; there being no proof that the statement was untrue and no evidence of special damage, it was held, that the action was not maintainable, and that no injunction should be granted (s).

On a Physician by falsely advertising medicines as of his preparation.

A physician may sue for an injury to his reputation by a vendor of quack medicines, advertising falsely and without the permission of the physician, certain pills as having been prepared by the latter (t).

On an Author, by issuing a spurious edition of his work.

So, too, an author may maintain an action, for injury to his

(o) *Hubbuck & Sons, Ltd. v. Wilkinson and others*, C.A. (1899), 1 Q. B. 86.

(p) *Alcott v. Millar's Karri, &c.* (1904), 21 T. L. R. 30; *Lyne v. Nicholls* (1906), T. L. R. 86, cor. Swinfen Eady, J.

(q) *Royal Baking Powder Co. v. Wright* (1900), H. L. App. 18 Rep. Pat. Cas. 95.

(r) *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763, 782.

(s) *White (App.) and Mellin (Resp.)*, (1895), Ap. Cas. 154; *Lyne v. Nicholls* (1906), T. L. R. 86, cor. Swinfen Eady, J.

(t) *Clark v. Freeman*, 11 Beav. 117; but see *Canham v. Jones*, 2 V. & B. 218.

reputation as a barrister-at-law and author of a law-work, against the publisher of a new edition, containing errors and inaccuracies in law and reasoning; such new edition falsely purporting to have been edited by the author: and this too, although the publisher be the owner of the copyright (*u*).

A person may also be liable to an action for a libellous publication on the property of another; particularly where the subject-matter of the libel is that by which the other obtains his livelihood: as in the case of a newspaper, by imputing that it is "the most vulgar, ignorant, and scurrilous journal ever published" and that "it is the lowest now in circulation; and we submit the fact to the consideration of advertisers." Lord Kenyon, C.J., ruled, that the latter words were actionable as affecting the sale of the paper, and the profits to be made by advertising (*x*). So too, an imputation on a rival newspaper, accusing the other of inserting spurious advertisements, is libellous of the proprietor (*y*). So also an imputation on a newspaper, that it had a column for the advertisements of quack-doctors and usurers; was held defamatory of the proprietors, and actionable without proof of special damage (*z*). And so also where the defendants published an article in their own newspaper referring to the plaintiff's newspaper as "The Evening Ananias" (*a*).

As to the procedure against libellers.—The law allows of two principal means of redress against the publisher of a libel: one by indictment or criminal information, the other a civil proceeding by action at law.

The proceeding by *indictment*, or by criminal information, is for the *public offence*: for every libel has a tendency to a breach of the peace, by provoking the person libelled to break it; which offence is the same (in point of law) whether the matter contained be true or false (*b*); and until the year 1843, the defendant, on an indictment, or information, for publishing a libel, was not allowed to allege the truth of it by way of justification (*c*). But by the Libel Act, 1843 (6 & 7 Vic.

(*u*) *Archbold v. Sweet*, 1 Moo. & Ap. Cas. 284; 63 L. J. P. C. C. 105.
Rob. 162; 5 C. & P. 219.

(*x*) *Heriot v. Stuart*, 1 Esp. 437.

(*y*) *Latimer v. Western Morning News Co.*, 25 L. T. N. S. 44, per Brett, J.

(*z*) *Russell v. Webster*, 23 W. R. 59.

(*a*) *Australian Newspaper Co., Ltd. (App.)*, and *Bennett (Resp.)* (1894)

(*b*) 3 Blac. Com. 125.

(*c*) 5 Rep. 125, the 4th resolution in the case *De Libellis Famosis*; *Lake v. Hatton*, Hob. 252; *The King v. Bickerton*, Str. 498; Digest Law of Libels, by a Gentleman of the Inner Temple (1765), p. 16; Bac. Abr. Lib. (A.) 5; and *R. v. Burdett*, 4 B. & Ald. 95.

Libels on
Newspaper
proprietors.

Procedure
against
libellers.

By indictment
or Criminal
Information.

CHAPTER VI. c. 96, s. 6), on the trial of any indictment or information for a libel, the defendant having pleaded such plea as therein mentioned, the truth of the matter charged may be inquired into, but will not amount to a defence unless it was for the public benefit that the matter charged should be published.

Where the matter is not actionable except on proof of special damage, it cannot be the subject of an indictment. And where there is a lawful excuse, (termed "a privileged occasion,") for writing and publishing what would otherwise have been a libel, it ceases to be a libel altogether.

By action at law.

The *civil proceeding* is by action at law to repair the party in damages for the injury done him. The defendant might always in this form of action, as for words spoken, justify the truth of the matter published, and show that the plaintiff had received no injury therefrom (*d*). But although defamatory matter be really true, it may nevertheless be a libel in a criminal court; and the truth may be an aggravation, or may not. In a civil court, however, if the defamatory matter is true, the plaintiff cannot recover damages in respect of it, if properly pleaded in justification, so as to give the plaintiff distinct notice of the defence intended to be relied on.

Privilege, as applied to defamatory communications.

Privileged communications.—The law of privilege as applied to defamatory communications, whether slanderous or libellous, is of two classes,—absolute and conditional.

1. *Absolute privilege*.—Defamatory communications that are absolutely privileged are those made in the course of judicial and parliamentary proceedings.

2. *Conditional privilege*.—Defamatory communications that are conditionally privileged are reports of judicial and parliamentary proceedings; newspaper reports of the proceedings of public meetings; and defamatory communications made by persons in the discharge of social or other duties, private or official, to all of which the occasion and circumstances under which they are reported, made, or published, supply a conditional defence; dependent in the one case on the fairness and accuracy of the report; and in the other, on the absence of malice in the party making or authorising the making of the same.

General grounds upon which the publication of defamatory matter may be excused.

And therefore the publication of a defamatory communication, whether verbal or written, can only be justified or excused, on one or other of the following grounds, (*viz.*)—

(*d*) Hob, 253; 11 Mod. 99; 3 Blac. Com. 126.

1. That it was a communication made in the course of a CHAPTER VI.
judicial or a parliamentary proceeding.

2. That it was a fair and accurate report of a judicial proceeding publicly heard before a Court exercising judicial authority.

3. That it was a fair and accurate report of proceedings in parliament.

4. That it was a communication made on a lawful occasion upon a matter of public interest ; and the publication of which was for the public benefit.

5. That it was a communication made on a lawful occasion, by a person standing in a privileged position, in the discharge of some duty, public or private, legal, social, or moral.

6. That the communication was true.

But the latter will be no defence to an Indictment or a Criminal Information, unless there be a plea on the record (in accordance with the statute (e)) to the effect that, it was for the public benefit that the communication should be published.

The limits and conditions attached to these several defences will be fully treated of and explained in subsequent chapters.

(e) 6 & 7 Vic. c. 96, s. 6.

THE LAW OF SLANDER AND LIBEL.

CHAPTER VII.

PART I.

PUBLICATIONS MADE IN THE COURSE OF JUDICIAL PROCEEDINGS.

OCCASION: ABSOLUTE PRIVILEGE.

Grounds of privilege and rule of law as to.

Privilege of Judges of Courts of Record.

Of Chairman of Quarter Sessions.

Of County Court Judges.

Of Coroner at an Inquest.

Justices at Petty Sessions.

Defamatory observations by strangers.

Privilege of Jurors, Suitors, Prosecutors, and Complainants.

Defamatory statements in the course of criminal proceedings.

Witnesses, privilege of.

" voluntary and irrelevant statements by.

Defamatory matter in affidavits, &c.

Scandalous and irrelevant allegations, how dealt with.

Voluntary and extra-judicial affidavits.

Privilege of speech of Counsel, or Solicitor, as advocate.

Summary of authorities.

CHAPTER VII.

Part I.

Grounds of privilege.

As to defamatory statements and publications made in the regular course of proceedings in courts of justice; by the general policy of the law, the occasion is such that it not only repels the presumption of malice, but, as it appears, excludes all evidence of malice, and allows the occasion and circumstances to supply an absolute and peremptory bar to an action or prosecution for slander or libel in respect of any such statements or publication. And the reason is founded on the principle, that, "the law will rather suffer a private mischief than a public inconvenience:" and that persons engaged in the administration of the law, and those who seek justice in respect of wrongs or injuries suffered, or give evidence as to any such, or make defence thereto, may not be deterred from so doing by the fear of being harassed by actions or prosecutions for defamation in respect thereof.

Rule of law as to.

And accordingly the law, without regard to the question of

intention, and on grounds of obvious policy, repels the claim to damages in respect of any publication, whether oral or written, made in the ordinary course of a judicial proceeding, civil or criminal. And this rule applies to judges, juries, witnesses, suitors and parties, in respect of anything stated by them in the course of any such proceeding. And the rule extends to military men, presiding at a military court of inquiry, or called before the same for the purpose of testifying there to matters of military cognizance.

CHAPTER VII.
Part I.

Judges of the Superior Courts of law and equity, of Assize, of Courts of Oyer and Terminer and Gaol Delivery, of Courts of Quarter Sessions, of County Courts, of other Courts of Record, of British Colonial Courts, and of Consular Courts, are not liable, either civilly or criminally, for defamatory statements made by them in the performance of their judicial functions, in the administration of justice (a). And the reason given in Coke's Reports, why a judge, for anything done by him as judge, shall not be drawn in question before any other judge, is, that the king himself delegates his power to his judges, who have the custody and guard of the king's oath : and as the judges of the realm have the administration of justice under the king, to all his subjects, they ought not to be drawn into question for any judicial proceedings before them tending to the slander of the justice of the king ; for such would tend to the slander of the king himself ; and therefore, the king himself shall take account of it ; and the judges ought only to make answer before the king himself (b), and the parliament (c).

It has, indeed, been held that whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the Bench, whether in the Superior Courts of law or equity, or in County Courts, or Sessions of the Peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged, and cannot be inquired into in an action-at-law for defamation.

(a) *Floyd v. Barker*, 12 Co. Rep. p. 395.

24 ; *Rea v. Skinner*, Lofft. 55 ; *Fray v. Blackburn*, 3 B. & S. 576 ; *Miller v. Hope*, *infra* ; *Scott v. Stansfield*, *infra* ; *Haggard v. Pelicier Frères*, P. C. (1892), A. C. 61 ; and see *Yates v. Lansing*, 5 Johns. Amer. Rep. 282, and S. C. in Court of Error, vol. 9,

(b) 12 Co. Rep. 25.

(c) By the Act of Settlement, 12 & 13 Wm. 3, c. 2, the judges are to hold their commissions "*quamdiu se bene gesserint*;" but, "upon the address of both Houses of Parliament, it may be lawful to remove them."

CHAPTER VII.
Part I.Censure of
Counsel by
Judge.

But a judge may be impeached if he acts maliciously, oppressively, or with partiality, in violation of his oath (*d*).

In a Scottish case, on appeal to the House of Lords (*e*), it was held, that an action for damages would not lie against a Supreme Judge for a defamatory censure passed by him, whilst acting in his judicial capacity, on a counsel practising at the Bar, and engaged in the cause then before the Court; although the censure was made injuriously, and from motives of private malice (*f*). But on this case being referred to by Blackburn, J., in the Court of Queen's Bench, Cockburn, L.C.J., observed, "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action" (*g*).

Privilege of
Chairman of
Quarter
Sessions.

Where a chairman of Quarter Sessions told the grand jury they were "a seditious, scandalous, corrupt, and perjured jury;" on an indictment being preferred against the chairman, motion was made to quash it; when Lord Mansfield, C.J., said if no precedent could be found for such a proceeding he should order it to be quashed immediately; (and it would appear that none was found); and that learned judge observed, that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office: that if the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt (*h*).

Immunity of
Judges of
County Courts.

And where the defendant, a county court judge, said of the plaintiff, who was an accountant and scrivener, "You are a harpy preying on the vitals of the poor:" the defendant pleaded in effect that he was the judge of a certain county court, and at the time when he spoke the words, was acting in his capacity as such judge, and was hearing and trying a cause, in which the now plaintiff was defendant, and the hearing and determination of which was within his jurisdiction; and that during such trial he, in his capacity as such judge, spoke the words complained of. To this plea the

(*d*) *Vide* Impeachment of Scroggs, L.C.J., 8 How. St. Tr. 163, 198; and *vide* Steph. Dig. Cr. L. p. 72.

(*e*) *Miller v. Hope*, 2 Shaw, App. Cas. 125; *Boyd Kinnear's Dig. H. L. Cas.* 96.

(*f*) It appears, however, from the judgment of the House of Lords, that if the statement complained of had been made extra-judicially it would

not have been privileged. *Ibid.* 2 Shaw, 145.

(*g*) *Thomas v. Churton*, *infra*; and see also per Lord Denman, C.J., *Kendillon v. Maltby*, *infra*; and per Channell, B., *Scott v. Stansfield*, *infra*. And per Cockburn, L.C.J., in *Dawkins v. Paulet*, 9 B. & S. 799.

(*h*) *Rex v. Skinner*, Loft. 55.

plaintiff replied—that the words were spoken and published falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in the discharge of defendant's duty as such judge, and were irrelevant and impertinent to the matter before him, as the defendant well knew. Upon demurrer to the replication, judgment was given for the defendant; and it was held, that no such action would lie (i).

CHAPTER VII.
Part I.

And a coroner, whilst holding an inquest, is not liable to an action for defamatory words used by him in his address to the jury, with reference to the conduct of a surgeon who attended the deceased; although the words be spoken falsely and maliciously (k).

Of Coroner at
an Inquest.

But the immunity of judges and others in the administration of justice, for anything said or done by them in the regular course of judicial proceedings does not extend to members of a County Council elected under the Local Government Act, 1888 : and therefore, where, at a meeting of the London County Council held for the purpose of hearing applications for music and dancing licences; upon the plaintiffs applying for a renewal of their licence, the defendant, a member of the Council, stated, as his reason for voting against the granting of the licence, that he had seen an indecent performance on the stage at the Aquarium. In an action by the plaintiffs in respect of such statement, as a slander upon them in the way of their business; it was held, that there was no absolute privilege in the defendant as a member of the County Council engaged at the time in the administrative duties of his office, as to anything said by him in the course of such duties; that the occasion conferred a qualified privilege only, dependent on the absence of express malice : and the verdict and judgment for the plaintiff with damages were upheld (l).

Quasi-judicial
proceedings by
County
Council.

In the case of justices of the peace at petty sessions it has been held, that it is only whilst they act within their jurisdiction that the privilege applies (m).

Justices of the
Peace at Petty
Sessions.

Where a magistrate, at the close of the business in a London police court, directed the attention of the newspaper reporters to a handbill issued and circulated by a rag and bone dealer ;

When not
acting in
judicial
capacity

(i) *Scott v. Stansfield*, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; 18 L. T. (N. S.) 572, Ex. (Limited) v. *Parkinson* (1892), 1 Q. B. 431 ; 61 L. J. 409.

(k) *Thomas v. Churton*, 2 B. & S. 475 ; 31 L. J. Q. B. 139. (m) *Miller v. Seare*, 2 Sir W. Blac. Rep. 1141-5 ; *Kendillon v. Maltby*, 1 Car. & Mar. 402 ; 2 Moo. & Rob. 440.

(l) *Royal Aquarium, &c., Society*

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Part I.

the magistrate stigmatised the handbill as most pernicious in its effects, and as offering great inducements to servants to rob their masters: it was held, that although a report in the newspaper, containing comments on the handbill, was privileged, yet the remarks by the magistrate were not, for they were not made with reference to any matter brought before him in court, and were wholly irrelevant to the business: the statement by the magistrate stood, therefore, on the same footing as if made by any private individual (n).

A Justice of the Peace is acting in his judicial capacity when sitting to administer the Lunacy laws, under the provisions of the Lunacy Act, 1890; and therefore, defamatory replies to requisitions made in the course of such a proceeding are absolutely privileged (o).

Justices acting
in judicial
capacity.

It was held in a recent case that a magistrate (or Justice of the Peace) presiding at a Court of Summary Jurisdiction, is a "Judge" within the meaning of the rule that defamatory observations made by him in the course of his judicial duties are not actionable, though made maliciously and without reasonable or probable cause (p).

Chief Con-
stable's Report,
issue of Copies
of.

Where the magistrates of a borough, with the object of facilitating the business at the general annual licensing meeting, directed the head constable to issue to persons applying for the same and having business at the meeting, a copy of his report, which contained remarks as to his objections to the renewal of certain licences: in an action against the head constable for libel contained in his report upon the plaintiffs' house, charging the plaintiffs with improper conduct on their licensed premises; it was held, that in the absence of malice, the occasion of issuing copies of the report as directed by the magistrates was privileged (q).

Defamatory
observations in
Court by
Justices'
Clerk:

Defamatory observations upon suitors, complainants, accused persons, and others in attendance before the court, if made by *persons other than those whose duty calls upon them to make them*, are not privileged. And so, where, on the investigation of a charge before the Lord Mayor in his magisterial capacity, an observation was made in open court by his

(n) *Paris v. Lery*, 9 C. B. N. S. 342; 30 L. J. C. P. 14; and see *McGregor v. Thwaites*, 3 B. & C. 24.

(o) *Hodson and another v. Pare*, C. A. (1899), 1 Q. B. 455.

(p) *Lau v. Llewellyn*, 1 K. B. (1906) C. A. 487.

(q) *Andrews and another v. Nott Bower* (1895), 1 Q. B. 888; 64 L. J. 536.

chief clerk, reflecting on the character and conduct of the accused, the observation was held to be altogether unwarranted, and the same as if made by any bystander in the court (r). So, too, a defamatory statement made by a bystander at a coroner's court, during an inquest, is not privileged: and therefore, a report containing such statement cannot be justified as a fair report of judicial proceedings, nor as part of such proceedings (s).

CHAPTER VII.
Part I.

by strangers
and by-
standers.

No proceeding, either civil or criminal, can be taken against grand jurors in respect of the discharge of their functions as such in inquiring into, finding and returning bills or indictments; nor against special, *petite*, or common jurors, in respect of their findings and verdicts, or otherwise in relation to the discharge of their duties as jurors (t). So it has been held that no presentment by a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do; but also, because it would be of the utmost ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires (u).

Privilege of
Jurors.

In an action of slander for imputing insolvency to the plaintiff in his business of a contractor for the repair of roads, it appeared that the alleged slander was spoken by the defendant as a grand juror of the county, when acting in that capacity in the fiscal business of the county, with reference to applications, then under the consideration of the grand jury, for the execution of certain county works, viz., the repair of roads and bridges; that the plaintiff was concerned in one of the applications as proposed contractor, and in others as proposed surety. It was held, that the occasion was privileged (x).

Grand Jury
are a quasi-
judicial body.

All applications made in the regular course of justice, to judges, justices of the peace, and other lawfully constituted tribunals of justice, by parties seeking redress for wrongs and injuries done to them, their property or estate, are privileged, though they be defamatory, and even false and malicious. The reason given for which is, that if actions for defamation should be permitted in such cases, those who have

Privilege of
Suitors, Pro-
secutors,
and Com-
plainants in
Courts of
Justice.

(r) *Delegal v. Highley*, 3 Bing. N. C. 961; and see *Maloney v. Bartley*, 3 Camp. 212.

(s) *Lynam v. Gowing*, 6 L. R. Ir. (Ex. D.), 259.

(t) *Vide Fitz. N. B.*, 115, D.

(u) 5 Bac. Ab. tit. Libel, p. 202; Moor, 627; Haw. P. C. c. 73, s. 8; Loftt. 55.

(x) *Little v. Pomeroy*, 7 Ir. R. C. L. 50.

CHAPTER VII. just cause of complaint would not dare to complain for fear of
 Part I. infinite vexation (y).

Defamatory
 statements in
 the course of
 criminal
 proceedings.

In criminal prosecutions, it seems also to be perfectly well established, that no action will lie for any defamatory matter disclosed in the course of such proceedings; but that the party must seek his remedy by action for a malicious prosecution, or by special action on the case founded upon the whole of the circumstances (z).

Statements to a constable on giving a person in charge, if made *bonâ fide* and without malice, are privileged (a). But although property has been actually stolen, the defendant is not warranted in the communication of a suspicion, which in fact is unfounded, except for the purpose of legal inquiry (b).

But, if a servant summon his master for wages, and the master in his necessary defence, utter words to the court imputing felony to the servant, no action will lie (c).

Parties con-
 ducting their
 own cases must
 do so with
 decency and
 decorum.

Parties conducting their own cases in courts of justice, must do so with decency and decorum; for, although they are not supposed to be so well informed as counsel, as to know what is strictly relevant and what irrelevant, they must not be insulting, nor defiant to the court; nor may they attack the characters of persons not before the court, particularly after being warned by the court of the impropriety or irregularity of so doing. And where the defendant was indicted for the publication of a blasphemous libel, and on his trial conducted his own defence, which he read from a written paper, in the course of which he reviled the Christian religion, and attacked the characters of persons not before the court: the learned judge warned him that he must confine himself strictly to matter relevant to his defence; but as he persisted in the same line of conduct, the learned judge imposed several fines upon him for contempt of court. He afterwards (by counsel) obtained a rule *nisi* for a new trial, on the ground that he was intimidated and confounded by the infliction of these fines, and omitted some most material parts of his defence. But the court held that no ground was shown for a new trial, and discharged the rule (d).

(y) See 4 Co. Rep. 14; Dyer, 285; 2 Ins. 228; 2 Buls. 629; Godb. 340.

(z) 10 Mod. 210, 219, 300, Str. 691; Ram v. Lamley, Hutt. 113.

(a) Vide Johnson v. Evans, 3 Esp. 32.

(b) Powell v. Plunket, Cro. Car. 52; Smith v. Hodgkins, Cro. Car. 276.

(c) Trotman v. Dunn, 4 Camp. 211; Moulton v. Clapham, 1 Roll. 87, pl. 4.

(d) The King v. Davison, 4 B. & Ald. 335.

By the general policy of the law, and as an expedient to the due administration of justice, witnesses are privileged as to the evidence they give, and as to statements they make in the course of their examination as witnesses ; such statements having reference to the inquiry upon which they are called, or required to give evidence. This privilege does not proceed on the ground that the occasion rebuts the *primâ facie* presumption of malice ; for if such were the ground, evidence of express malice would remove it. The principle is, that the due administration of justice requires that witnesses should be permitted to give their testimony free from any fear of being harassed by an action on an allegation whether true or false, that they acted from malice (*e*).

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Witnesses,
privilege of.

Witnesses are not free agents ; they appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty ; and though the law requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony (*f*).

An inquiry before an Ecclesiastical Commission appointed by a Bishop, and authorised by statute, is a judicial tribunal ; and, therefore, statements made by a witness in the course of such inquiry are absolutely privileged (*g*).

Witness, in
Ecclesiastical
inquiry.

And, therefore, no action will lie for defamatory statements made by witnesses in the regular course of any judicial proceeding, civil or criminal, whether such statements be made *vivâ voce*, or by affidavit or deposition ; even though they be false and malicious, and without any reasonable or probable cause, and the plaintiff sustain damage in consequence. In spite of repeated attempts to break in upon this rule, and notwithstanding all that may be said against it, the rule has been acted upon, and firmly adhered to from the time of Queen Elizabeth (*h*).

No action for
defamatory
statements by
witnesses.

(*e*) See *Dawkins v. Lord Rokeby*, 7 E. & I. Ap. 752 ; 45 L. J. Q. B. D. 13.

(*f*) See 2 Inst. 228 ; 2 Rolles Rep. 198 ; Pal. 144 ; 1 Vin. Abr. 387 ; Cro. Eliz. 230.

(*g*) *Barratt v. Kearns*, 1 K. B. (1905), C. A. 504.

(*h*) See 1 Vin. Abr. 387 ; Cro. Eliz. 230 ; Hutt. 11 ; Godb. 240, pl. 333 ;

Cro. Jac. 601, pl. 26 ; Jones, 431 ; Hob. 205, pl. 259 ; 4 Co. b. 14, pl. 2 ; *Floyd v. Barker*, 12 Rep. 24 ; *Astley v. Younge*, 2 Burr. 807 ; *Revis v. Smith*, 18 C. B. 126 ; *Dawkins v. Lord Rokeby*, 7 E. & I. Ap. 744 ; *Seaman v. Netherclift*, 2 C. P. D. 53 ; *Watson v. Jones*, A. C. (1905), 480.

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If the evidence given by a party or witness in a court of justice be false, such party or witness is liable to be indicted for perjury. And if he go out of his way to slander another by uttering irrelevant and defamatory matter, he may be fined and imprisoned for contempt of court. But beyond this the law of England affords no redress to the party so defamed.

Voluntary and
irrelevant
statements by
witnesses.

Statements made by witnesses must, however, be made with reference to the matter before the court, and spoken in the character of witness, and in the course of such witness's evidence. A voluntary statement made by a witness before he enters the witness-box, or after he has left it, having no reference to the matter before the court, is not necessarily privileged (*i*). And where, at a preliminary investigation before a magistrate, as to a charge of forgery of a bill of exchange, a witness was called, as an expert, to state his opinion as to the handwriting on the bill, and on cross-examination was asked, if on a former occasion he had not given evidence in a certain suit in the Probate Court (impeaching a testator's signature to a Will), and if he had read the remarks of the presiding judge of that court on the evidence he gave on that occasion?—to which the witness replied "Yes." The cross-examining counsel then sat down. The witness then, despite the efforts of the presiding magistrate to stop him, persisted in saying, before he left the witness box, "I believe that Will to be a rank forgery, and shall believe so till the day of my death." The attesting witness to the Will having brought an action of slander against him for this statement, it was held, that the action could not be sustained, even if the words were spoken maliciously; the statement having been made by the utterer in his character of witness, in explanation of, and relevant to the matter put to him in cross-examination (*k*).

Statement
made to
Solicitor
before trial.

The privilege, or immunity, which surrounds the evidence given by a witness in a Court of Justice, necessarily involves the same privilege in statements made by the witness to a Solicitor, Writer to the Signet, or others engaged in the conduct of proceedings in a case pending in a Court of Justice (*l*).

Affidavits
containing
defamatory
matter.

False or scandalous matter contained in affidavits, and in statements in reply thereto, made in the regular course of a

(*i*) See per Cockburn, L.C.J., and Bramwell, B., *Seaman v. Netherclift*, 540; 45 L. J. 798; on App. 2 C. P. D. 53; 46 L. J. 128.

supra. (*l*) *Watson (App.) and Jones (Resp.)*,

(*k*) *Seaman v. Netherclift*, 1 C. P. D. A. C. (1905), 480.

judicial proceeding, is not actionable. And so, in one of the earliest cases on the subject, where the plaintiff declared that he made an affidavit in *Banco Regis*, of certain matters, to have the defendant bound over to his good behaviour; and that the defendant in the hearing of the justices and officers of the court, and others then present, and intending to scandalise the plaintiff, said "There is not a word of truth in that affidavit, and I will prove it by forty witnesses." After verdict for the plaintiff, in which the jury found that the words were spoken falsely and maliciously; it was held, on motion in arrest of judgment, that the action was not maintainable; for the words were spoken by the defendant in defence of himself, in answer to the plaintiff's affidavit, in a legal and judicial way, and were a justification in law (*m*). And where an affidavit was made in a suit pending in Chancery, by one of the defendants to the suit, imputing fraudulent conduct to an auctioneer who had been proposed by the suitors on the other side as a fit and proper person to sell the estate: in an action by the auctioneer founded upon the defamatory statements contained in the affidavit; it was held, on demurrer, that the action would not lie; that it had neither principle nor analogy to sustain it; and therefore, notwithstanding that the statements contained in the affidavit were false and malicious, and made without reasonable or probable cause, and that the plaintiff had suffered damage in consequence, the action could not be sustained (*n*). So, no action will lie for false and defamatory expressions contained in an affidavit made and used in the proceedings in an action; though the person they refer to is not a party to the proceedings (*o*).

It is clear, therefore, from the preceding authorities, that there can be no libel in any pleading, affidavit, or other form of procedure in the regular course of justice, if the allegation, or statement, however defamatory, be material; and if it be immaterial, the court in which the indignity is committed, may order satisfaction by directing it to be expunged from the record (*p*), with costs against the party guilty of such irregularity. And so also if charges of a criminal nature are made,

Scandalous and irrelevant allegations may be expunged.

(*m*) *Moulton v. Clapham*, 1 Roll. Abr. 87, pl. 4; Sir W. Jones, 431; *S. C. Boulton v. Clapham*, Mar. 20, pl. 45; *Atley v. Younge*, 2 Burr. 807. *Broomhead*, 4 H. & N. 569; 28 L. J. Ex. 360; *Doyle v. O'Doherty*, 1 Car. & Mar. 418; *Gompas v. White*, 54 J. P. 22.

(*n*) *Revis v. Smith*, 18 C. B. 126; 25 L. J. C. P. 195. (*p*) See per Lord Mansfield, C.J., 2 Burr. 810.

(*o*) *Ibid.*, and see *Henderson v.*

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that are false and irrelevant, and not material to the issue; on exception being taken to them on the ground of scandal, they will be ordered to be expunged, with costs, as between solicitor and client, against the offending party (q). But no action can be brought in respect of such scandal, although the matter expunged be irrelevant and impertinent, as well as defamatory (r).

Voluntary and
extra-judicial
affidavit.

But there is no privilege attaching to a voluntary and extra-judicial affidavit; such not being made in the regular course of a judicial proceeding (s).

Defamatory
Notice in a
legal pro-
ceeding.

A notice in a legal proceeding is, *prima facie*, privileged, though containing matter defamatory of the party affected by it: and no action will lie for the publication thereof by delivery to a third person for service upon the plaintiff, unless upon proof of express malice. But if the defendant, knowing that he had no claim upon the plaintiff, and no right to serve such a notice upon him, chooses to put a notice of the kind into the hands of a third person for the purpose of being served, that would be a publication, and might amount to a libel if express malice were proved (t).

Letter to Judge
to influence
decision.

A letter addressed to a judge upon the subject-matter of the case that is coming before him for hearing, being an irregular and improper proceeding, is not privileged (u).

Libellous
statements
in Solicitor's
Bill of Costs.

A solicitor has no privilege to libel his client in his bill of costs delivered at the request of the client to another solicitor, although the bill be delivered in pursuance of a judge's order (v).

But where, in objections in writing lodged on taxation of a solicitor's bill of costs, pursuant to the orders and rules of court, certain defamatory statements were made on the plaintiffs who were the solicitors concerned, it was held, that the occasion of the publication was absolutely privileged (x).

Privilege of
speech of
Counsel.

The same protection which (as already shown) the law gives to witnesses and parties, with regard to statements made by them in the regular course of judicial proceedings, is also, with

(q) See *Ex parte Simpson*, 15 Vesey, 476; *Christie v. Christie*, 42 L. J. Ch. 544; L. R. 8 Ch. App. 499.

(r) *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195.

(s) *Maloney v. Bartley*, 3 Camp. 210.

(t) *Bank of British North America v. Strong*, 1 App. Cas. 307, 312.

(u) *Gould v. Hulme*, 3 C. & P. 625, per Tindal, C.J.

(v) *Bruton v. Downes*, 1 F. & F. 668, per Bramwell, B.

(x) *Pedley and another v. Morris*, 61 L. J. Q. B. D. 21; 65 L. T. 526; and *vide Lilley v. Roney and another*, 61 L. J. Q. B. D. 727.

some limitations, given to counsel when speaking as advocates in behalf of their clients in courts of justice. No action, either of slander or libel, will lie against counsel for words spoken by them in their professional capacity in the course of any trial or other inquiry, before a duly constituted tribunal of justice; provided the words so spoken be relevant to the subject-matter of the inquiry (y).

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And the privilege extends to comments made by counsel upon facts proved in a cause, or proposed to be proved, and relevant to the matter in issue. It would be impossible that justice could be well administered if counsel were to be questioned for the too great strength of their expressions (z).

Where on an application for a criminal information against a solicitor, for having sent to one of Her Majesty's counsel two letters and a challenge to fight a duel, and for afterwards publishing the letters in a newspaper: the principal grounds relied on in showing cause against the rule, were—1st, that the defendant had been provoked by the observations of the applicant in his address to the jury in defence of a woman charged with bigamy, in which the learned counsel animadverted on the conduct of the defendant (who was the solicitor engaged on behalf of the prosecution), and imputed to him the concoction of evidence to sustain the indictment; and 2ndly, that the imputation was not made in the exercise of his right as counsel, nor in the discharge of his duty as such. It was held, that although such observations by counsel might not be justifiable unless warranted by facts proved, or which might legally be proved, yet they must not be redressed by a violation of the law (as by a challenge to fight a duel); but must be made matter of legal complaint and redress (a).

Words of
Counsel must
not be
redressed by
a violation
of the law.

It has been held by the court of Queen's Bench in Ireland, that a proctor, acting as advocate in an Ecclesiastical court, is not privileged in making observations during the progress of a cause, reflecting on the integrity of the presiding officer of the court, and accusing him of partiality and unfairness; if such observations be not relevant to the cause (b).

Proctor acting
as advocate.

A solicitor, acting as advocate, has the same privilege of

Solicitor
acting as
advocate.

(y) *Brooke v. Sir Henry Montagu*, Cro. Jac. 90; *Wood v. Gunston*, Styles, 462.

C. P. 9.

(a) *Butt, Q.C. v. Jackson*, 10 Ir. L. R. 120 (T. T. 1846).

(z) *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Needham v. Dowling*, 15 L. J.

(b) *Higginson v. O'Flaherty*, 4 Ir. C. L. R. 125.

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speech as counsel. And so where the defendant, an attorney, attended on behalf of K. before magistrates, on a summons for an assault upon the plaintiff in turning him off the premises of one J. his employer; the defendant stated in the course of the inquiry, that J. had sufficient reasons for the assault, as he had been plundered by the plaintiff to a frightful extent; it was held, that no action would lie against the defendant for the words uttered by him in defence of his client (c). And the rule is the same even if such words be wholly irrelevant and unjustifiable; and though they be spoken maliciously and without any reasonable or probable cause (d).

Summary of
authorities.

From the preceding authorities it may be collected generally that no action of slander, nor any proceedings either civil or criminal for libel, can be maintained against a judge of any or either of His Majesty's Courts of Justice for anything said or done by him in his judicial capacity; nor against the president of an Ecclesiastical court duly constituted; nor can any action of slander or libel be sustained against counsel, jurors, suitors, complainants, prosecutors, defendants, or witnesses, in respect of anything spoken or written by any such in their several capacities aforesaid, relative to the matter in hand, in the ordinary course of the administration of justice; even if it be false and malicious, and uttered without reasonable and probable cause. And the privilege extends to statements made by a party or witness to a solicitor before trial; and to statements contained in affidavits, pleadings, and other proceedings in the usual and regular course of legal procedure. But an action for a malicious prosecution may be supported against a person prosecuting another upon an unfounded charge, if malice, and the absence of reasonable and probable cause, can be established: and an indictment for perjury may be maintained in respect of any false evidence, whether oral or written, given upon oath or affirmation in the course of any judicial proceeding, and material to the issue. And as to irrelevant, immaterial, and opprobrious matter, the court may order such to be expunged from the proceedings; and in some cases, such matter may amount to a contempt of court, and be punishable accordingly.

(c) *Mackay v. Furd*, 5 H. & N. 792;
29 L. J. Ex. 404.

(d) *Munster v. Lamb*, 11 Q. B. D.
588; 52 L. J. 726.

CHAPTER VII.

PART II.

REPORTS OF JUDICIAL PROCEEDINGS.

CONDITIONAL PRIVILEGE.

Statutory privilege as to reports of judicial proceedings.

Rule of the Common law as to.

Limitations of the statutory rule.

As to the subject-matter of the Report.

Where the inquiry concerns blasphemous, obscene, or indecent matters.

Reports of ex parte and preliminary proceedings.

Judicial proceedings heard in camera.

Publication of Official registers of judgments, &c.

Trades Gazette publications.

As to the manner in which judicial proceedings may be reported.

Mis-statements and misrepresentations not justifiable.

Reports of trials must be fair and accurate.

Report unfair, when?

Reports of statements and speeches of Counsel.

Comments in Newspapers, &c., on Trials and reports of judicial proceedings.

As to the publication of reports of proceedings in courts of justice : by a recent statute for amending the law of libel (a) it is enacted that,—“ A fair and accurate report in any newspaper, of proceedings publicly heard before any court exercising judicial authority, shall, if published contemporaneously with such proceedings, be privileged : Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.”

The section is, mainly, declaratory of the law as at present administered. The privilege it confers is not new, nor is it absolute, but merely conditional, (viz.) that the report be “ fair and accurate ; ” and with the further condition (which is new) that it be published “ contemporaneously with such proceedings.” Therefore a report, although fair and accurate, published some time after the hearing, would not be within the privilege conferred by the statute.

It will be observed that the words of the section are—“ any court exercising judicial authority,” which is sufficiently wide and comprehensive to include every court of justice, from the highest in the land to that of a Court of Petty Session. It

(a) 51 & 52 Vic. c. 64, s. 3.

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privilege as
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proceedings.

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would also include a court held by a Registrar in Bankruptcy (b). So also a Committee of the House of Lords for conducting an inquiry upon a matter referred to them (c).

The words "publicly heard" are obviously intended to exclude reports of proceedings heard *in camera*. But whether they would include proceedings in which the court had no jurisdiction to hear the application, remains to be seen: it would appear, however, that other words of the section are wide enough to include such a report, and this too although no judicial decision be given on the hearing of the application (d). It should also be observed that the section applies only to newspaper reports; therefore a report published in a book, pamphlet, placard, or other medium than a newspaper, derives no protection under the statute.

It is clear, however, that in all cases, be the report published in a newspaper or in any other form of publication, the main question as to the fairness and accuracy of the report will be, as hitherto, a question of fact for the determination of the jury (e). And, therefore, the same principles of law which, prior to the statute, guided the court in its direction to the jury upon the question as to what constitutes a fair and accurate report, and the jury in finding the fact in the particular case before the court, must still be applied in every case brought to trial in which the report is challenged as unfair or inaccurate.

Rule of the common law as to reports of judicial proceedings.

Independently of the statute above cited, on principles of public policy (f), and of the benefit and advantage to the community, the rule at common law is, that no action can be maintained in respect of a fair and impartial report of a judicial proceeding publicly heard in a court of justice.

Limitations of the statutory rule.

1st. As to the *subject-matter* of the report; and
2ndly. As to the *manner* in which the proceeding is reported.

The statutory privilege is *conditional*, and must be taken with these qualifications, (viz.), that the subject-matter of the

(b) See *Ryalls v. Leader and others*, 35 L. J. Ex. 185; 4 H. & C. 555; L. R. 1 Ex. 296.

(c) *Kane v. Mulrany*, 1r. L. R. 2 C. L. 402.

(d) See the cases cited on this point prior to the statute, *infra*, p. 105.

(e) *Vide Wason v. Walter*, 8 B. & S. 671; 38 L. J. Q. B. 34; *Stevens v. Sampson*, 5 Ex. D. 53; 49 L. J. 120;

Blake v. Stevens, *infra*; *Milisch v. Lloyds*, *infra*.

(f) The late Lord Davey stated in the course of his judgment in a recent case in the House of Lords, that "public policy" appeared to him to be always an unsafe and treacherous ground for legal decision: *Janson v. Driefontein Cons. Mines* (1902).

report is fit and proper for publication; that its publication would not be prejudicial to the interests of justice; and that it be neither garbled, prejudiced, nor untruthful; but fair, honest, and impartial, and strictly and properly confined to the actual proceedings in court.

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The advantages to the public, and the benefit to society, by the publication of judicial proceedings, more than counter-balance the occasional inconvenience to individuals and injury to the private character of those whose conduct may be the subject of such proceedings (*g*).

The object, therefore, in the publication of reports of proceedings of courts of justice, being to afford information to the public, and not to asperse the characters of individuals concerned, the presumption of malice is rebutted: but if the report be untruthful or unfair, the inference of malice arises, and the opinion of the jury must be taken upon it.

It is an erroneous—though perhaps popular—impression, that newspapers enjoy the privilege of publishing, with impunity, anything which takes place in a court of law (*h*).

Where the publication is such that it tends to interfere with the course of justice, or to create a prejudice against the parties before the case is heard, as by the premature publication of the contents of judicial documents, it is a contempt of court (*i*).

1st. *As to the subject-matter of the report.*—The section of the statute above cited, as conferring privilege on newspaper reports of judicial proceedings, specially provides that nothing therein contained shall authorise the publication of any blasphemous or indecent matter.

As to the subject-matter of the report.

Where the very object is to protect the interests of religion, morality, decency, and good order, by repressing impious, blasphemous and obscene, or seditious publications, it would not only be impolitic but weak and absurd to allow the same matters to be afterwards published with impunity as parcel of the judicial proceeding. In the case of *The King v. Mary Carlile* (*k*), a criminal information was granted against the defendant, for a libel, entitled “The mock trial of Mr. Carlile,” but which contained a correct account of what had taken place upon that trial, in the course of which the whole of

No privilege to report blasphemous, obscene, or indecent matter.

(*g*) See *Curry v. Walter*, *infra*; also per Lawrence, J., in *The King v. Wright*, 8 T. R. 297; and per Lord Campbell, C.J., in *Davison v. Duncan*, 7 E. & B. 231; and see *Wason v. Walter*, *infra*, p. 127.

(*h*) Per Lord Russell, L.C.J., in *The Queen v. Gray*, 16 T. L. R. (1900), p. 305.

(*i*) *Vide infra*, “Contempt of Court.”

(*k*) 3 B. & Ald. 167.

CHAPTER VII. Paine's "Age of Reason" had been read. And the court held, that though, as a general proposition, it was certainly lawful to publish the proceedings of courts of justice, yet that it must be taken with this qualification, that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor to offend the morals of the people; for if its contents were calculated to produce such effects, instead of disseminating useful knowledge, it would produce great mischief.

Report of a trial setting out an obscene pamphlet.

And where a pamphlet had been published, containing, substantially, a correct report of the trial of one *Mackey*, on an indictment for a misdemeanour in selling a certain obscene work called the "Confessional Unmasked,"—the report, which was in other respects a correct one of the trial and proceedings, set out that work in full; whereas at the trial it was not actually read, but "taken as read," and passages in it only were referred to: it was held (following the case of *The King v. Mary Carlile*), that the privilege given by law to the publication of reports of judicial proceedings did not extend to reports containing matters of an obscene and demoralising character: and the pamphlet in question being offensive to public decency was not privileged as the report of proceedings in a court of justice (l).

Reports of *ex parte* and preliminary proceedings in Courts of Justice.

Until a comparatively recent period, the publication of *ex parte* proceedings in criminal cases was not only not privileged by the law, but was regarded as an illegal act, in respect of its tendency to obstruct the course of public justice. And accordingly in several instances, the publication of matters of criminal charge, contained in depositions before magistrates and in speeches of counsel, has been held to be illegal, and in some cases indictable (m). But, according to more recent authorities, reports of *ex parte* and preliminary proceedings, publicly heard in courts of justice, have (long prior to the recent statute) been held to be privileged, provided they were not prejudicial to the interests of justice, were fair and accurate, and published with a view to the information of the public (n). And so also since the statute (o).

(l) *Steele v. Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; and *vide infra*, Criminal Division, "Immoral Publications."

(m) See *Rea v. Lee*, 5 Esp. 123; *Rea v. Fleet*, 1 B. & Ald. 379; *Rea v. Clement*, 4 B. & Ald. 218; *Lewis v. Walter*, *Ibid.* 605; *Duncan v.*

Thwaites, 3 B. & C. 556; *Rea v. Fisher and others*, 2 Camp. 571.

(n) *Vide Curry v. Walter*, 1 Bos. & Pul. 525; *Lewis v. Levy*, E. B. & E. 537; *Wason v. Walter*, 8 B. & S. 671; 38 L. J. Q. B. 34.

(o) *Kimber v. The Press Association, Limited* (1893), 1 Q. B. 65; 62 L. J. 152.

As to applications made to a magistrate in matters over which he has no jurisdiction; the rule of privilege as to fair and correct reports of the proceedings of courts of justice extends to the report of an *ex parte* application to a magistrate, upon an alleged criminal charge, terminating in the refusal of the magistrate to proceed with the application, on the ground that he had no jurisdiction (*p*). And now, as to newspaper reports of such applications, it would appear that they are within the privilege conferred by the 3rd section of the recent Act for the amendment of the Law of Libel (*q*).

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Where magistrate has no jurisdiction.

No privilege is conferred by the statute to publish reports of judicial proceedings heard *in camera*: on the contrary, the section specifically states—"proceedings publicly heard before any court exercising judicial authority." And in cases in which a magistrate upon a preliminary inquiry respecting an indictable offence carries on the inquiry in private, the publication of such a proceeding was, long prior to the statute, held to be unlawful (*r*); and would be so still.

Judicial proceedings heard *in camera*.

It appears that a railway company may publish, by placard, at their railway stations, the name, address, and occupation of any person who has been convicted before magistrates of any infringement of the company's by-laws, with a report or statement of the nature of the offence and the punishment awarded (*s*). But a railway company has no more right to print and publish such placards than any one else. The report must therefore be correct, for if it state that the party convicted was sentenced to imprisonment with *hard labour*, when, in fact, hard labour formed no part of the sentence, the publication cannot be justified; and an action of libel may be maintained against the railway company for such false publication (*t*).

Placards of Convictions for infringements of Railway Company's by-laws.

The common-law rule as to the privilege of fair and correct reports of the proceedings of courts of justice, extends to the publication of extracts from public registers of judgments and other official records. So, it has been held to be no libel to publish in a printed paper, for the information of subscribers to a trade protection society, called "The Scottish Mercantile

Publication of Official registers of Judgments, Records, &c.

(*p*) *Usill v. Hales*; *Same v. Brearley*; *Same v. Clarke*, 3 C. P. D. 319; 47 L. J. 323; but see *McGregor v. Thwaites and another*, 3 B. & C. 24.

(*q*) *Supra*, p. 101.

(*r*) *Lewis v. Lery*, E. B. & E. 558; 27 L. J. Q. B. 287.

(*s*) See *Biggs v. Gt. Eastern Ry. Co.*, 16 W. R. 908; 18 L. T. N. S. 482; *Alexander v. N. E. Ry. Co.*, 6 B. & S. 240; 34 L. J. Q. B. 152.

(*t*) *Gwynn v. S. E. Ry. Co.*, 18 L. T. N. S. 738, per Cockburn, L.C.J.

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judgment.Trades
Gazette,
publications of
judgments.

Society's Record" (which was known among the trading community as "the Black List"), the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes; such register being a public document, which all persons have a right to inspect (*u*). But a person publishing a copy of a registered judgment does so at his peril; for if the judgment has been satisfied by payment before the publication, and he publish it as an existing liability, he is liable in an action for libel: and if special damage has followed, in an action for a false representation (*x*).

But where a judgment was obtained in England against the plaintiff *as executor of his deceased father*, and a certificate of the judgment was duly and correctly registered in the Q. B. Division in Ireland, under the Judgments Extension Act, 1868: but in registering the judgment in the Registry of Judgments Office, under 7 & 8 Vict. c. 90, owing to a mistake in the minute certified by the officer of the Q. B. Division, the judgment was described as recovered against the plaintiff *personally*, and the particulars of the judgment so registered were published in "Stubbs' Gazette:" in an action of libel by the plaintiff against the proprietors of the Gazette, there being no evidence of malice, nor that the defendants had notice of the error; it was held, affirming the judgment of the Exch. Div., that the publication was privileged (*y*).

And where the defendant published in a trade protection society's journal, under the heading "Extracts from the Register of County Courts Judgments," a statement that a judgment had been registered against the plaintiff for an amount stated, with the date thereof; but directly under the heading of the list there was a note, to the effect that no distinction was made in the register between actions for debt or damages, or properly disputed cases, neither was it known which of the judgments remained unpaid. The judgment against the plaintiff had in fact been paid a few days subsequently to the date thereof. At the trial, the learned judge (Day, J.) directed a nonsuit, on the ground that the words complained of were not capable of a defamatory meaning:

(*u*) *Fleming v. Newton*, 1 H. L. 363; 6 Bell's Sc. App. Cas. 175.

(*x*) *McNally v. Oldham*, 16 Ir. C. L. R. 298; 8 L. T. N. S. 604; and see *Williams v. Smith and another*, 22 Q. B. D. 134; 58 L. J. 21; *Jones v. McGovern*, L. R. Ir. 1 C. L. 681; but

see *Cosgrave v. The Trade Auxiliary Co.*, Ir. R. 8 C. L. S. 349; *McLaughlin v. Doey* (1893), 32 L. R. Ir. Ex. D. 519.

(*y*) *Annaly v. The Trade Auxiliary Co., Ltd.* (1890), L. R. Ir. 26 Q. B. 394.

and it was held by the Court of Appeal, that the nonsuit was right—that the case was governed by that of *Fleming v. Newton* (z); that the publication of a copy of the contents of a register of judgments, kept by virtue of an Act of Parliament for the purpose of giving information to the public, and which by law the public are entitled to inspect, is privileged; and in the absence of express malice, the action could not be sustained (a).

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But in an action of libel brought by a trader, for publishing in a trade gazette belonging to the defendants, an inaccurate extract from a deed of inspectorship registered under the provisions of the Deeds of Arrangement Act, 1887; which extract, though officially supplied to the defendants, was nevertheless inaccurate; the defendants pleaded privilege: it was held, that the plea could not be supported—for a person publishing an extract from a public document is responsible if it has not been correctly extracted (b). And in an action for maliciously causing judgment to be entered and registered against the plaintiff; which entry and its registration were set aside as irregular; it was held, notwithstanding the irregularity, that the entry was in the course of a judicial proceeding and was privileged (c).

The publication of the records of proceedings of certain public bodies, invested by statute with *quasi-judicial* powers, is privileged if published *bonâ fide* and without malice, and if fair, accurate and truthful. And so, where the General Council of Medical Education and Registration having in pursuance of their statutory powers in that behalf, adjudged that a certain registered practitioner had been guilty of infamous conduct in a professional respect, and that his name be struck off the Medical Register; they afterwards published a report of their proceedings in the matter, with the grounds of their decision. In an action of libel against the Medical Council for such publication, it was held, that having regard to the nature of the tribunal, the interest of the public in the matter, and the duty of the Council towards the public, the report stood, on principle, in the same position as a report of judicial proceedings: and therefore, if fair and accurate, and published *bonâ fide* and without malice, the same was privileged (d).

Publication of
Records of
Proceedings of
Public Bodies
invested with
quasi-judicial
powers.

- (z) *Supra*, p. 106. (c) *MacCabe v. Joynt* (1901), 2
(a) *Searles v. Scarlett* (1892), 2 Q. B. D. (Ir.) 115.
Q. B. 56; 61 L. J. 573. (d) *Allbutt v. The General Medical*
(b) *Reis v. Perry* (1895), 64 L. J. Council, 23 Q. B. D. 400; 58 L. J. 606.
Q. B. D. 566, per Day and Wright, JJ.

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Part II.

As to the manner in which judicial proceedings may be reported.

Mis-statements, and misrepresentation of facts, are not justifiable.

2ndly. *As to the manner in which a judicial proceeding may be reported.*

According to the statute (e), the report must be fair and accurate, and published contemporaneously with the proceedings of the Court.

It is therefore plain that the statute will not admit of any misrepresentation of the facts; to mis-state any part of the proceeding would be not to benefit and instruct, but to mislead the public, and might create most intolerable mischief to individuals, inasmuch as it would annex to calumny a degree of authenticity from its supposed connection with a solemn and deliberate judicial investigation. It is not, however, necessary to resort to the latter consideration for the purpose of divesting such a publication of legal defence; it is sufficient that the misrepresentation deprives the defendant of the excuse which might have been available to him under the statute had he reported the facts correctly. Nor will the protection afforded by law to such publications warrant any high colouring of the circumstances stated (f): nor any omission of a material fact which removes the sting or obloquy of the proceeding (g). And where the editor of a treatise on the "Law of Attorneys," in dealing with the subject of striking attorneys off the rolls for misconduct, referred to a case relating to the plaintiff (reported in the "Law Journal") as that of an attorney who had been *struck off the rolls*; whereas it appeared from the very report cited, that he had only been *suspended for two years*; it was ruled, that the question for the jury was, whether or not the mis-statement arose from want of reasonable diligence and care, and whether it was a fair representation of the report (h).

Reports of trials must be fair and accurate.

The same principle applies, independently of the statute, not only to misrepresentations of facts, but also to all partial and garbled statements, prejudicial to the character of the individual to whom they relate; such reports are, at the least, useless to the public, and to individuals oftentimes most injurious. In order to justify the report of a trial, it must be shown that it is fair and *bonâ fide*, and not a mere summary of that which happens to have made the most impression

(e) *Supra*, p. 101.

(f) *Stiles v. Nokes*, 7 East, 493.

(g) See *McNally v. Oldham*, *supra*, also *The King v. Lofield*, 2 Barnard, K. B. 128.

(h) *Blake v. Stevens and others*, 4

F. & F. 235; 11 L. T. Rep. (N. S.) 543; per Cockburn, L. C. J., and see *Gwynn v. S. E. Ry. Co.*, *supra*, p. 105; and *Shepherd v. Whitaker*, L. R. 10 C. P. 502.

upon the fancy of the writer. A reporter has no business to convey an imputation that the testimony of any witness was untrue, got up for the occasion, or discredited by the jury (*i*); nor to insinuate the guilt of a man who, having been charged with a crime, has been tried and acquitted (*k*). But although the report contain some allegations injurious to the plaintiff, yet it is a question for the jury whether the whole report, taken altogether, is fair and accurate upon the face of it (*l*). If, in one part of the publication, something discreditable to the plaintiff is stated, which is removed by the conclusion; the bane and antidote must be taken together (*m*). And an abridged and condensed report of what passes in a court of justice may be published, if done fairly and accurately (*n*). The fact that the report contains only the speech of the prosecuting counsel and the summing up of the judge, and omits the evidence, does not necessarily show that the report is unfair (*o*). If the report is *substantially* a fair account of what took place, there is an entire immunity for those who publish it (*p*). Where no evidence is given as to whether the report is or is not fair and impartial, it will still be a question for the jury whether it was published with a malicious motive (*q*). And he who publishes only a partial report, or a fragment of the proceedings, leaves himself open to the charge of unfairness and malice.

It is obvious, that, if it were allowable to pick out and select particular parts of a judicial proceeding, the privilege would be liable to the most grievous abuse, and that under the colour and pretence of communicating to the public useful and necessary information, which is the legitimate ground for investing such publications with peculiar and extraordinary means of protection, the reputation of individuals would be subjected to most unjust and unmerited calumny.

If the reporter has singled out from the summing up of the judge that only which bears unfavourably on the conduct of the party complaining, the report will be unfair (*r*); for partiality

Report unfair when?

(*i*) *Roberts v. Brown*, 4 Moore & Scott, 407; *Lewis v. Lery*, 27 L. J. Q. B. 287.

(*k*) See *Risk Allah Bey v. Whitehurst and others*, 18 L. T. (N. S.) 615.

(*l*) *Chalmers v. Payne and another*, 2 C. M. & R. 156.

(*m*) *Ibid.* 159, per Alderson, B.

(*n*) Per Byles, J., in *Turner v. Sullivan and others*, 6 L. T. (N. S.)

130.

(*o*) See per Mellish, L.J., in *Milisch v. Lloyds*, *infra*.

(*p*) Per Lord Campbell, C.J., in *Andrews v. Chapman*, 3 Car. & Kir. 289.

(*q*) *Chalmers v. Payne and another*, 5 Tyrw. 766; 2 C. M. & R. 156.

(*r*) *Saunders v. Mills*, 6 Bing. 219.

CHAPTER VII.
Part II.Defamatory
headings to
reports.

and unfairness may arise from suppression as well as from invention ; and therefore, if the report omit all mention of the testimony of a witness who gave important evidence in favour of the defendant, the report is unfair, and cannot be justified (*s*). And a report of proceedings before a magistrate is unfair and unjustifiable which assumes the truth of the depositions and the guilt of the accused, and predicts that he will "meet with the legal punishment of his villainy" (*t*).

Where the libel complained of was as follows—"Threatening letters. The Middlesex Grand Jury have returned a true bill against a gentleman of some property named French," it was held by Lord Tenterden, C.J., and the rest of the court, that the words could not be read in any other sense than, that the Grand Jury had found a true bill against the plaintiff for sending threatening letters : and that such a bill must import an unlawful threatening letter (*u*).

And where a report in a newspaper, of certain proceedings in a court of law, was headed "Shameful conduct of an attorney," the heading itself was deemed a libel, as it formed no part of the proceedings in court (*x*). And so also where a paragraph in a newspaper was headed "How Lawyer Bishop treats his Clients ;" it was held, that although prefixed to the report of a particular case which occurred in a court of equity, the words implied not only that the plaintiff treated his clients ill in that particular case, but that he so treated them generally ; and therefore, the report was not justified by proof of ill-treatment of the client in the particular case the subject of the report (*y*). Where a report of a trial appeared in a magazine, twenty years after the trial had taken place, and referred to a "damning piece of evidence," which it was stated, was not elicited at the trial ; it was held, that a plea which omitted to justify the latter imputation was no answer to an action for the libel (*z*). And where the plaintiff, a barmaid, was charged with stealing money from the till, and on investigation before a magistrate the charge was dismissed : in a newspaper report of the case when the plaintiff was given into custody, it was headed "Daring Robbery," and in a

(*s*) *Duncan v. Thwaites*, 31 B. & C.

580.

(*t*) *Rex v. Fisher*, 2 Camp. 571.

(*u*) *Harvey v. French*, 1 Cr. & Mees.

17.

(*x*) *Clement v. Lewis*, 7 Moore, 200 ;

aff. Ex. Cham. 3 Brod. & Bing. 297.

(*y*) *Bishop v. Latimer*, 4 L. T. (N. S.) 775, per Byles, J.

(*z*) *Helsham v. Blackwood and another*, 11 C. B. 111 ; 20 L. J. C. P.

187.

subsequent report of the proceedings before a magistrate, the report was headed "Charge against a Bar-maid:" it was proved that the reporter had headed his report "*Unfounded charge against a Bar-maid*," but the word "unfounded" had been struck out by some person on the editorial staff. The learned judge, at the trial, having ruled that there was no case to go to the jury, and directed a verdict for the defendant; the court ordered a new trial; and held, that the case should not have been withdrawn from the jury, who were the proper tribunal for deciding as to the fairness or unfairness of the report, and the guardians of the interests and liberty of the press (*a*).

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A fair report of a trial, or other judicial proceeding, published in the form of a pamphlet, though not within the privilege conferred by the recent statute (*b*), is nevertheless entitled to the same protection at common law as if published in a newspaper. If therefore the pamphlet contain a fair abstract of what took place at the trial, and it be published without malice, it will be privileged; but the question as to the fairness of the report must be submitted to the jury (*c*). So also the publication in the form of a pamphlet, of a fair and accurate report of the judgment delivered in an action in the High Court of Justice, though without any report of the evidence, is privileged in the absence of malice, notwithstanding that there are passages in the judgment reflecting upon the character of the plaintiff (*d*). In such a case the question for the jury is, not whether the publication is a fair and accurate report of the judgment delivered by the judge who tried the case, but whether it is a fair and accurate report of the proceedings at the trial, as a whole (*e*).

Pamphlet containing report of a trial;

containing report of judgment only.

Where the defendant assumed to himself the character of reporter, and sent to several newspapers reports of a case tried in a county court, in which he had acted as solicitor for one of the parties: the report contained matter defamatory of the plaintiff, who was the other party to the case. The jury having found that the defendant was actuated by malice towards the plaintiff in sending the reports; it was held, that the defendant was liable; although the jury found also, that the reports were fair (*f*).

Report of trial sent to newspapers by the solicitor for one of the parties.

(*a*) *Street v. Licensed Victuallers' Society*, 22 W. R. 553.

17 Q. B. D. 636; 55 L. J. 464.

(*b*) *Supra*, p. 101.

(*c*) *Ibid.* 14 App. Cas. 194; vide *Macdougall v. Knight* (No. 2), 25

(*c*) *Miliusch v. Lloyds*, 46 L. J. C. P. 405; 36 L. T. 423.

Q. B. D. 510; 59 L. J. 522-4.

(*d*) *Macdougall v. Knight & Son*,

(*f*) *Stevens v. Sampson*, 5 Ex. D. 53; 49 L. J. 120.

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Part II.

Where the
report affects
persons not
parties to the
proceedings.

Where the report contained reflections on the character of a person not a party to the proceedings, it was urged that the report in question was not such a report of proceedings in a court of justice as the law protects, because it reflected upon the character of a third person: and it was held, that if the matter was not wholly irrelevant to the inquiry, even though it reflected on the character of a third person its publication was protected; and per Bramwell, B., whether relevant or irrelevant it would be protected (*g*).

Reports of
Speeches and
statements of
Counsel.

As to defamatory statements and speeches of counsel and others in courts of justice; when the occasion for making them ceases, the right also ceases; and it has been held (prior to the statute) that they cannot, lawfully, be afterwards published. And, therefore, that reporters are not privileged in publishing speeches of counsel containing reflections on the characters of individuals, annexed to a short summary of the trial, without stating the evidence (*h*). So it has been held, that the publication of the speech of counsel in a judicial proceeding, coupled with a general assertion that his statement was proved by a witness called upon that trial, cannot be justified (*i*). So too, it was held, that a statement in a newspaper of the speech of counsel in a cause, reflecting on the character of the plaintiff, who was the defendant in that cause, without stating any of the evidence, could not be justified; though the defendant proved that he had copied the paragraph from another paper (*k*). The evidence ought to be stated, in order that those who read the report may judge for themselves; and it is not sufficient to substitute the mere inference of the reporter (*l*). And where defamatory statements were made against a defendant, by a solicitor, in stating a case for the prosecution in a police court, it was held that a journalist was not justified in publishing them as facts, if they were disproved at the hearing or not supported by the evidence adduced (*m*). And though the evidence be stated in the report, it seems to have been doubtful, whether the publication of the speech of counsel, which reflected on the reputation of another, could be justifiable, unless, at least, it appeared that the observations

(*g*) *Ryalls v. Leader*, 4 H. & C. 565; C. L. 402.
L. R. 1 Ex. 300.

(*h*) *Flint v. Pike*, 4 B. & C. 473.

(*i*) *Lewis v. Walter*, 4 B. & Ald.
605.

(*k*) *Saunders v. Mills*, 6 Bing. 213;
and see *Kane v. Mulrany*, Ir. L. R. 2

(*l*) Per Abbott, L.C.J., 4 B. & Ald.
612.

(*m*) *Ashmore v. Borthwick*, 49 J. P.
792, per Pollock, B., and Manisty, J.
(affirmed by Court of Appeal, 2 Times
L. R. 209).

were warranted and that the party deserved them (*n*), or that they were so connected with the case, that the detail was necessary for the information of the public (*o*). For, it was said, that although counsel are necessarily privileged in addressing the court or jury, it by no means follows that a reporter or other person is privileged in publishing expressions, which a counsel, from his peculiar situation, is sometimes justified in using. He may be answered in the progress of the cause, or it may be that he was misinstructed. It does not follow that because the counsel is privileged as to what he states in a court of justice, a publisher may circulate his expressions all over the kingdom in a printed paper (*p*). And therefore, although a counsel might not be responsible in an action for slander, yet a party who repeats the slanderous matter to all the world, may be liable to an action; for the publication of such slander is not done in the course of the administration of justice (*q*). But the question in all such cases, in which the report is published in a newspaper, will now (since the statute) be, whether or not the report so published was upon the whole, fair and accurate and published contemporaneously with the proceedings (*r*).

As to *comments* on trials and reports of proceedings in courts of justice; these stand on a different footing to the reports themselves. A comment in a newspaper upon the report of a trial that is over, or proceeding ended, in a court of justice, may be justified on the ground that it was a matter of public interest; but such comment must be fairly and honestly made, and founded on the facts, so that a jury shall find that it was not only fair and honest, but well founded (*s*); for the privilege which protects the reports themselves does not extend to any defamatory observations or comments upon matters which did not transpire in court. And although a report of proceedings in a court of bankruptcy may be privileged under the general rule; still, comments by the editor of a newspaper, on the report, are not privileged if they go beyond it and impute to another dishonest dealings with the bankrupt (*t*). And

Comments in Newspapers, &c., on Trials and Reports of judicial proceedings]

(*n*) See per Holroyd, J., 4 B. & C. 477, *ibid.* 482.

(*o*) See the quære of Bayley, J., 4 B. & C. 476. But see *Curry v. Walter*, 1 Bos. & Pul. 525.

(*p*) *Roberts v. Brown*, 10 Bing. 524; *Woodgate v. Rideout*, 4 F. & F. 202.

(*q*) See per Holroyd, J., in the case of *Flint v. Pike*, 4 B. & C. 481.

(*r*) *Vide* 51 & 52 Vic. c. 64, s. 3.

(*s*) See *Wason v. Walter*, 8 B. & S. 733; 38 L. J. Q. B. 45.

(*t*) Per Erle, C.J., in *Behrens and others v. Allen*, 3 F. & F. 135.

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where a reporter takes upon himself to aver that the evidence adduced against the plaintiff "entirely negatived his story," such conclusions are wholly unjustifiable; and if a report of law proceedings has, mixed up with it, comments reflecting upon any of the parties whose names appear in it, such report entirely loses the privilege it might otherwise claim (*u*).

There is a distinction between a mere inference and a conclusion introducing a substantive fact, which requires a distinct justification. And when, in commenting on public statements, new and additional facts are introduced, which are not justified, it is always a question for the jury whether such comments are fair. A comment may be the mere shadow of the previous imputation; but, if it infers a new fact, the commentator must abide by that inference of fact; and the fairness and *bona fides* of the comment must be decided upon by a jury (*x*).

The evidence of a witness, given upon oath in a public court of justice, is a matter of public interest and importance, and a legitimate subject for fair and *bonâ fide* comment. But a report of a libellous speech of counsel, given without the evidence by which it was supported and without any object towards the prosecution of the cause, is not a report of the proceedings of a court of justice within the meaning of the term "privilege," nor is it a fair comment thereon. A writer in a newspaper is privileged in discussing the conduct of magistrates in dismissing a charge of felony without fully hearing the evidence; and also in commenting upon the evidence given in support of the view that the charge ought not to have been dismissed; but if he attempt to show from matters of fact *not given in evidence*, that the charge was well founded, and the accused guilty, he loses the privilege and is liable to an action at the suit of the accused (*y*). In commenting upon the proceedings of a court of justice a public writer, as much as a private writer, is bound to attend to the truth, and to put forward the truth honestly, in good faith and to the best of his knowledge and ability. If he give a one-sided and partial view of the proceedings, so as to convey false and calumnious reflections upon personal or professional character, or use

(*u*) *Lewis v. Lery*, E. B. & E. 537; A. & E. 1016.

27 L. J. Q. B. 287.

(*x*) *Cooper v. Lawson*, 8 A. & E. 746; *Stockdale v. Tarte and others*, 4

(*y*) *Hibbins v. Lee*, 4 F. & F. 243; and see *Hedley v. Barlow*, 4 F. & F. 224.

epithets of contumely or obloquy (although they have already been used by counsel in the cause) such will be evidence of unfairness, and will take away the privilege, and render the writer liable to an action of libel (z).

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CHAPTER VIII.

PUBLICATIONS MADE IN THE COURSE OF PARLIAMENTARY PROCEEDINGS.

OCCASION : ABSOLUTE PRIVILEGE.

General principles as to the privilege.

No liability in courts of justice for statements in Parliament.

Privilege absolute only within walls of House.

Petitions to Parliament, when privileged.

Reports of parliamentary papers, debates and proceedings.

Analogy between publication of parliamentary and judicial proceedings.

General principles and limits of the privilege.

Publications by order of Parliament.

Statute, giving protection to publication of parliamentary papers.

Reports of Speeches, debates, and proceedings in Parliament.

Fair comment on a parliamentary debate of public interest.

THE same principles and policy upon which defamatory statements and publications made in the course of proceedings in courts of justice are privileged, apply to and govern all such statements and publications that are made in the course of parliamentary proceedings. To the one as to the other, on principles of public policy, the law allows the occasion and circumstances of the publication to supply an absolute and peremptory bar to an action of libel or slander in respect of any such publication.

CHAPTER VIII.
General principles as to the privilege.

No member of either House of Parliament is in any shape responsible in a court of justice for anything said in that house, however offensive the matter may be to the feelings, or detrimental to the interest, of any individual (a). And accordingly, in such cases, courts of law possess no jurisdiction (b). But the privilege does not extend beyond the walls of the house to which the member belongs; and

No liability in courts of justice for statements in parliament.

(z) *Woodgate v. Rideout*, 4 F. & F. 202; per Cockburn, L.C.J.

(a) By 4 Hen. VIII. c. 8, members of Parliament are protected from all charges against them for anything said in either House. And this is further declared in the Bill of Rights, 1 W. &

M. Sess. 2, chap. 2.

(b) *Dillon v. Balfour*, L. R. (Ir.) 20 Ex. Div. 600. And it has been held that an agreement, or conspiracy, by Members of either House of Parliament, to make defamatory speeches in Parliament to the injury of a

CHAPTER VIII.

Liability of member for publishing defamatory speech.

therefore, a peer, who publishes libellous matter in the public prints, as having constituted part of his speech in Parliament, is as open to an action or prosecution for such publication as any private individual (c). The principle of the cases—*The King v. Lord Abingdon* and *The King v. Creevey*—is, that on grounds of public policy, the constitution gives unrestrained freedom of speech to the members of both Houses of Parliament, speaking within their respective chambers; and whatever may be there said, is censurable only according to the rules of Parliament, and before the Parliament. But it does not follow, because a member, for the sake of the public good, has freedom of speech before an assembly in Parliament, that he may therefore publish his speech in the shape of an appeal to the people; nor that he may convert a parliamentary speech into a popular harangue, and carry his privilege of Parliament as a shield against legal responsibility, where the reason of such privilege totally ceases. The privilege is only absolute within the walls of the House: it is not personal, but local: and therefore, where the reason ceases and the condition of the place does not exist, the promulgation or publication of slanderous and libellous matter is necessarily subject to the control and punishment of the law: for the privilege would become intolerable if a member of Parliament, having any malignant passion against an individual, might by first legalising his slander in carrying it through the House, thereafter publish it without responsibility to the laws.

Privilege absolute only within walls of House.

Petitions to Parliament, though defamatory and false, are privileged.

The printing and exhibiting a false and scandalous petition to a committee of the House of Commons, and delivering copies thereof to the members of the committee, has been held to be justifiable, because in the order and course of proceedings in Parliament (d). But the publication of any such petition to persons other than members of the committee, or of Parliament, would be actionable (e).

M.P., refusal of, to present a petition to Parliament.

No action will lie against a member of Parliament, at the suit of a constituent, for refusing to present a petition to the House of Commons for the redress of certain alleged grievances; even if such refusal be alleged to have been done maliciously (f).

petitioner, cannot be the subject of an indictment: *Ex parte Wason*, 38 L. J. Q. B. 302; 40 L. J. M. C. 168; L. R. 4 Q. B. 573.

(c) *R. v. Lord Abingdon*, 1 Esp. R. 226; *R. v. Creevey*, 1 M. & S. 273; and

see *Stockdale v. Hansard*, 9 A. & E. 1.

(d) *Lake v. King*, 1 Saund. 131.

(e) *Hare v. Meller*, 3 Lev. 169; 4 Rep. 14; Sid. 414.

(f) *Chaffers v. Goldsmid* (1894), 1 Q. B. 186.

A witness summoned to give evidence before a select committee of the House of Commons, is absolutely privileged as to statements he makes when under examination by and before such committee (g). CHAPTER VIII
Witness at
Parliamentary
Committee.

Notwithstanding the analogy assumed to exist between the publication of parliamentary and of judicial proceedings, there seems to be a wide and manifest distinction between them ; and the statute 51 & 52 Vic. c. 64 (h), which confers a conditional privilege on reports of judicial proceedings, does not apply to reports of parliamentary proceedings. And indeed with respect to many parliamentary proceedings, so far is it from being *legally* essential to the interests of the public that they should be divulged, that a party who publishes reports of them is, in strictness, guilty of a breach of the privileges of the House. Courts of justice, on the other hand, are open to all : the common law of the land is to be learned principally by attention to the practice and proceedings of such courts ; and therefore it is of essential importance to the public that reports of the proceedings of courts of justice should, to a great extent at least, be communicated to the public. Analogy
between publi-
cation of
parliamentary
and judicial
proceedings.

It is, however, obviously of advantage to the public, and even to the legislature besides, that true accounts of the proceedings of Parliament should be generally circulated ; but they would be deprived of that advantage if no person could publish such proceedings without being liable to an action of libel for so doing. And therefore it is, by the common law, upon similar principles of public policy, and of the benefit and advantage to the community, whereby the publication of reports of proceedings in courts of justice are privileged, that the publication of the debates and proceedings of Parliament are protected : and whilst all the privileges of the one are conceded to the other, so also the limitations placed on the one to prevent injustice to individuals, apply also to the other. And, accordingly, fair reports of debates and proceedings in Parliament, though containing matter defamatory of individuals, are privileged at common law. But the privilege in the one case, as in the other, is *conditional* ; and therefore subject to the qualifications, that the subject-matter of the report is fit and proper for publication ; that its publication would not be prejudicial to the welfare of the State, or injurious to the national General prin-
ciples and
limits of the
privilege

The privilege
is conditional.

(g) *Goffin v. Donnelly*, 6 Q. B. D. 307 ; 50 L. J. 303. (h) *Supra*, p. 101.

CHAPTER VIII. interests; and that the report itself be neither garbled, prejudiced nor untruthful, but fair, honest, and impartial; published with a view to afford information to the public, and not for the purpose of casting aspersions upon the characters of individuals concerned.

Publications
by order of
Parliament.

As to the authority of either House of Parliament to *order* the publication, *out of the House*, of defamatory matter, on the ground that it formed part of the proceedings of the House; the question underwent considerable discussion, and was elaborately argued in Trinity Term, 1839, in the great case of *Stockdale v. Hansard* (i), when, by the unanimous decision of the Court of Queen's Bench, it was held to be no defence in law to an action of libel, that the libel was part of a parliamentary proceeding, and was published under the *authority* and by *order* of the House of Commons.

That decision having brought the House of Commons into direct conflict with the Law Courts; and other actions being immediately commenced by the same plaintiff against the same defendant for similar publications; the matter was warmly debated in Parliament, on a petition presented by the defendant; and an Act was soon afterwards passed for giving summary protection to persons employed in the publication of parliamentary papers (k).

Publication by
order of House
of Commons
of defamatory
papers and
proceedings.

In the great case referred to (l), the plaintiff, by his declaration, alleged, that he was a bookseller and publisher of books, and had published divers and very many scientific books, and particularly a certain physiological and anatomical book, written by a learned physician, on the generative system, illustrated by anatomical plates; and the defendants published, in a certain book, purporting to be "Reports of the Inspectors of the Prisons of Great Britain," the passage following (*viz.*), "This last is a book of a most disgusting nature; and the plates are indecent and obscene in the extreme:" and in a certain printed paper purporting to be a copy of the Reply of the Inspectors of Prisons, &c., the words following (*viz.*), "But we deny that the book is a scientific work (using that term in its ordinary acceptance), or that the plates are purely anatomical, calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms which we have already employed, as those only by which

(i) *Infra.*

(k) 3 & 4 Vic. c. 9; *vide* Appendix of Statutes.

(l) *Stockdale v. Hansard and others*,

9 A. & E. 1.

to characterise such a book." . . . "We also applied to CHAPTER VIII. several medical booksellers, who all gave it the same character. They described it as one of Stockdale's obscene books; that it never was considered a scientific work; that it never was written for or bought by the members of the profession as such; that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work." The defendant pleaded, at considerable length, a justification, the effect of which was, that in pursuance of a certain Act of Parliament, the inspectors of prisons made a Report to the Secretary of State, in which improper books were said to be permitted in the prison of Newgate; that the Court of Aldermen wrote an answer to that part of the report, and the inspectors replied, repeating the statements, and adding, that the improper books were published by the plaintiff. That all those documents were printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for use of the members; and who also resolved, declared, and adjudged, that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, was an essential incident to the due performance of the functions of Parliament. To this plea the plaintiff demurred, assigning for causes: that the known and established laws of the land cannot be superseded, suspended or altered by any resolution or order of the House of Commons; and that the House of Commons, in Parliament assembled, cannot by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land; and that if such power be assumed by them there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm. It was contended (*m*) on the part of the defendant, that the grievance complained of was an act done by order of the House of Commons, a court superior to any court of law, and none of whose proceedings were to be questioned in any way. That the defendant published the alleged libel by order of the House of Commons in the exercise of a privilege claimed by them; that each House of Parliament is the sole judge of its own privileges; and that the court could not inquire into the existence of that privilege. That the right to authorise a publication, which the House of Commons thinks beneficial to

(*m*) By Sir John Campbell, Attorney-General, in the course of a learned and elaborate argument.

CHAPTER VIII. the community and essential to the discharge of its legislative functions, is an ancient privilege recognised by legislative declarations, and never questioned since the revolution, except by the plaintiff. That the House of Commons in directing the defendant to appear and plead to the action, did not thereby submit its privileges to the decision of the court or of any other tribunal than itself. That the only object of the pleading, was to inform the court in a regular way, that the act complained of was done in the exercise of its authority and in the legitimate use of its privileges. That the fact that it was so done was admitted by the demurrer; and nothing remained for the court but to give judgment for the defendants. It was admitted that the publication was criminatory, and that the declaration showed good ground of action; but denied that the publication was a libel. That the question of privilege was directly raised, and could not therefore be inquired into by a court of common law. That no criminal or civil liability was incurred for acts done by the authority of either House of Parliament. That assuming that the court (*n*) were competent to inquire into the existence of the privilege, it could be shown that the power of printing and publishing reports and papers, though of a criminatory nature, for public information and benefit, had long existed: and if the House had power to order the publication, it must follow as a necessary consequence, that no action would lie: for criminatory matter published by lawful authority could not be a libel. But the members of the court (*o*) were unanimous that the defence pleaded was no defence in law, and accordingly they gave judgment for the plaintiff. Lord Denman, C.J., in the course of his judgment (one of the most masterly and luminous ever delivered in Westminster Hall) observed, that the principle contended for on the part of the defendant, was a claim for an arbitrary power to authorise the commission of any act whatever on behalf of a body, which it was admitted was not the supreme power in the State. And, said the learned judge, "The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of

(*n*) *I.e.*, Court of Queen's Bench.

Patteson, and Coleridge, JJ.

(*o*) Lord Denman, C.J.. Littledale,

them cannot alter the law, or place any one beyond its control. CHAPTER VIII.
 The proposition is therefore wholly untenable, and abhorrent to the first principles of the Constitution of England."

. . . . "That Parliament enjoys privileges of the most important character no person capable of the least reflection can doubt for a moment. Some are common to both Houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in *aulâ regiâ*, they rest on the stronger ground of a necessity, which became apparent at least as soon as the two houses took their present position in the State. Thus the privilege of having their debates unquestioned, (though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors), was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by any member, to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility. So, if the Speaker, by authority of the House, order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it, than King Charles's warrant for levying ship-money could justify his revenue officer." "The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution; but, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it; though the party should deserve the severest penalties, yet his offence being committed the day before the prorogation, if the House order his punishment but for a week, every court in Westminster Hall, and every judge of all the courts, would be bound to discharge him by *habeas corpus*." "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they

CHAPTER VIII. bear as the Grand Inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded, without a murmur or a doubt. We freely admit them in all their extent and variety ; but if, on a resolution of guilt voted by themselves, the Grand Inquest should not accuse but condemn, should mistake their right of initiating a charge, for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder ?" . . . "In truth no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second proposition differs from the first in words only. In both cases the law would be superseded by one assembly ; and, however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible ; in itself the most monstrous and intolerable of all abuses." As to the argument that the *practice* of printing and publishing parliamentary papers had prevailed ever since the Long Parliament, his Lordship observed, "The *practice* of a ruling power in the State is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden ; general warrants had been issued and enforced for centuries before they were questioned in actions by Wilkes and his associates, who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much ; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose without incurring the displeasure of the offended House, instantly enforced if it happened to be sitting, and visiting all who had been concerned. During the session it must be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information involving the tedious process of law, while privilege with one voice accuses, condemns, and executes. And the order to 'take him,' addressed to the serjeant-at-arms, may condemn the offender to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced

a general persuasion that the privilege existed in point of law?" (p). CHAPTER VIII.

And Littledale, J., observed in his judgment in the same case (q), with reference to the privilege of Parliament to order the publication of defamatory papers, that "such a proceeding could not be justified under the Bill of Rights: it is not such a proceeding in Parliament as the Bill of Rights refers to, but out of Parliament. The privileges of Parliament appear to be confined to the walls of Parliament, to what is necessary for the transaction of the business there, to protect individual members, so that they may always be able to attend to their duties, and to punish persons who are guilty of contempt to the House, or against the orders and proceedings or other matters relating to the House, or to individual members in discharge of their duties to the House, and to such other matters and things as are necessary to carry on their parliamentary functions; and to print documents for the use of its members. But a publication sent out to the world, though founded on and in pursuance of an order of the House, becomes separated from the House; and no longer any matter of the House, but of the agents employed to distribute the papers: those agents are not the House, but individuals acting on their own responsibility as other publishers of papers." And Patteson, J., stated in the course of his judgment in the same case (r), "It is clear that no action can be maintained for anything said or done by a member of either House, in the House; and the individual members composing the House of Commons, whether it be a Court of Record or not, may, like other members of a Court of Record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under

(p) On the trial of this case at Nisi Prius, Lord Denman, C.J., seems to have said, with reference to the defence, that the libel was published and sold in pursuance of resolutions of the House of Commons, and the contention that the publication was privileged by their authority—"I am not aware of the existence in this country of any body whatever, that can privilege any servant of theirs, to publish libels of any individual. Whatever arrangements may be made between

the House of Commons and any publisher in their employ, I am of opinion, that the publisher who publishes that in his public shop (and especially for money) which may be injurious, and possibly ruinous to any one of the King's subjects, must answer in a Court of Justice to that subject if he challenge him for a libel." [Note to *Stockdale v. Hansard*, 9 A. & E. p. 101; and see S. C. 2 Moo. & Rob. 9.]

(q) 9 A. & E. 184.

(r) *Ibid.* 189.

CHAPTER VIII. them. A servant cannot shelter himself under the illegal orders of his master, nor could an officer under the illegal orders of a magistrate, until the legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse that act, if it be in its nature illegal; and it is necessary in answer to an action for the commission of such illegal act, to show not only the authority under which it was done, but the power and the right of the House of Commons to give such authority." And judgment was given for the plaintiff (s).

Collision
between the
House of
Commons and
the Law
Courts.

After the decision in the case of *Stockdale v. Hansard and others*, the plaintiff brought other similar actions against the defendant, who then petitioned the House of Commons on the subject: when it was afterwards resolved by the House, as to one of the actions, that no defence be made to it; therefore judgment was suffered to go by default: and the sheriffs having levied for the amount of damages, the House of Commons sought to restrain them from paying the amount over to the plaintiff; and passed a resolution to that effect. They were afterwards committed to Newgate for breach of privilege in paying over the amount to the plaintiff in opposition to the resolution of the House of Commons. The plaintiff and his attorney were also declared guilty of breach of privilege, and both were committed to the custody of the serjeant-at-arms and imprisoned at Newgate. In consequence of this remarkable collision between the House of Commons and the law courts, an Act (t) was passed in the next session of Parliament for the purpose of protecting from civil and criminal liability, persons employed by Parliament in the publication of its papers.

Statute giving
Protection to
persons em-
ployed in the
publication of
Parliamentary
papers.

Observations
on the statute.

It should be observed with regard to the protection afforded by the above-mentioned statute, that it does not appear to be compulsory on the Lord Chancellor, or others, to grant the certificate; and in no case could it be granted unless the

(s) This case has been stated here somewhat fully on account of its peculiar importance; though, after all, it is but a mere note of it; the report from which it was taken occupying no less than *two hundred and forty-three pages* in the 9th Vol. of Adol. & El. Reports. The Court of Queen's Bench in giving judgment in

the subsequent case of *Wason v. Walter*, L. R. 4 Q. B. 86; 38 L. J. Q. B. 40, expressed their unhesitating and unqualified adhesion to the decision of the Court in this case.

(t) 3 & 4 Vic. c. 9. See the statute set out verbatim in the Appendix of Statutes, *infra*.

defendant was actually "employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such report," &c.

When the publication is a copy of such duly authorised report, &c., no certificate is necessary; but an affidavit verifying the correctness of such report, &c. And if the publication be only an extract or abstract of such report, &c., evidence may be given to show that such extract or abstract was published *bonâ fide* and without malice: but the opinion of the jury must be taken upon it.

The only case which has at present come before the courts upon the construction of any section of the Act, is that in which the plaintiff in the case above stated brought another action against the same defendants for a similar libel, and in which an interlocutory judgment had been signed: when a certificate under the hand of the Speaker of the House of Commons was obtained and served on the plaintiff: the certificate stated, in effect, that the book and paper mentioned in the declaration were published by the defendants by order and under the authority of the House of Commons. Upon affidavits, with the certificate annexed, it was moved on the part of the defendants that proceedings in the case be stayed. The plaintiff was allowed to show cause in the first instance; and the rule for staying execution was made absolute (x).

With regard to the publication, by newspaper proprietors and others, of reports of speeches, debates, and other proceedings in Parliament, containing matter defamatory of individuals, although a most important question, it only recently came before a court of law for decision, and is the first instance of an action of libel founded on a newspaper report of a parliamentary debate (y).

As to the authorities prior to this case, see below (z).

Every member of Parliament has liberty of speech in Parliament: but if he publish his speech to the world, it then becomes the subject of common law jurisdiction; and the circumstance of its being accurate, or intended to correct a misrepresentation, will not the less make him amenable to the common law in respect of the publication (a). And per Lord Campbell, C.J., "A member of Parliament who publishes an

(u) *Stockdale v. Hansard and others*, *supra*, p. 118.

(x) *Stockdale v. Hansard and others*, 11 A. & E. 297.

(y) *Vide Wason v. Walter, infra*.

(z) *The King v. Williams*, 2 Show. R. 471; Comb. 18; and *The King v. Wright*, 8 T. R. 293.

(a) *R. v. Creevey*, 1 M. & S. 273.

Case in which proceedings stayed.
Reports of Speeches, Debates, and Proceedings in Parliament.

CHAPTER VIII. amended version of his speech in Parliament cannot justify as to that, although he might have spoken the same words in his place with impunity. But if a member were to repeat *bonâ fide* to his constituents what he said in the House, for the purpose of explaining his conduct to them, I think he would be protected" (b). And it has been said, that "If the member whose conduct is blamed by his constituents, wishes to vindicate his conduct, he may send what parliamentary papers he pleases, provided they do not contain any criminary matters of individuals; but it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in Parliament" (c).

Fair and accurate reports of parliamentary debates are privileged.

Until recently these were all the authorities upon the important question—*the privilege of reporting speeches, debates, and proceedings in Parliament*. The question may now, however, be considered as settled, by the unanimous judgment of the Court of Queen's Bench. The plaintiff brought an action against the proprietors of the Times newspaper, for a libel contained in a report, which was published in that paper, of certain speeches delivered in the House of Lords, and in certain leading articles commenting upon those speeches. It appeared that on the appointment of Sir Fitzroy Kelly to the high judicial office of Lord Chief Baron of the Court of Exchequer, the plaintiff wrote a letter to the Prime Minister (the Earl of Derby) impugning the appointment, on the ground (as alleged) of unfitness, by reason of certain calumnious charges therein stated against him; and a petition from the plaintiff, founded upon the charges contained in that letter, having been presented to the House of Lords, praying for a committee of inquiry, with a view to the removal of Sir F. Kelly from his judicial office, a debate took place in that House upon the petition and the charges referred to; in the course of which the Lord Chancellor refuted the charges brought against the Lord Chief Baron, and commented with much severity upon the conduct and character of the plaintiff; and ascribed the proceeding to rancour, arising out of an election quarrel upwards of thirty years ago, and declared that the imputations of the plaintiff upon Sir F. Kelly were altogether false and without foundation, and that the petition would remain "a perpetual record of the falsehood and malignity of the plaintiff." The declaration contained two

(b) *Davidson v. Duncan*, 26 L. J. Q. B. 107.

(c) Per Littledale, J., in *Stockdale v. Hansard*, 9 A. & E. 181.

counts, one founded upon a *report* in "The Times" newspaper of the debate in the House of Lords, the other upon a *leading article* in the same newspaper, commenting upon the debate, and expressing an opinion to the effect that the censure passed upon the plaintiff in the course of the debate was deserved. At the trial before Cockburn, L.C.J., the jury were directed, in substance, that, as regards the report of the debate; if in the opinion of the jury it was fair and faithful, it would be a privileged publication, and could not be the subject of an action of libel; that the same principles upon which fair and *bonâ fide* reports of proceedings in courts of justice were privileged, seemed to apply with equal, if not greater force, to reports of proceedings in the two Houses of Parliament: and as to the leading article, the subject being one pre-eminently of public interest, they must be satisfied that the article was a fair comment on the facts; that although the comments might have been made with an honest belief in their justice, yet such was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and condemn the conduct or motives of another, must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation; so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure. And the jury having found for the defendants upon both issues, the court were unanimous in their judgment that the direction was correct; and held, that a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to an individual spoken of in the course of the debate, is not actionable at the suit of the party whose character has thus been brought into question (*d*). That the same principle and privileges which are accorded to the publication of the reports of proceedings in courts of justice extend and apply to the publication of the reports of proceedings in Parliament: that the analogy between them being complete, all the limitations placed on the one to prevent injustice to individuals necessarily attach to the other. That a garbled or partial report of a debate, or of detached parts of proceedings, published with intent to injure individuals, would equally be disentitled to protection. But as to fair, honest, and faithful

CHAPTER VIII.

Fair comment on a parliamentary debate, of public interest, is privileged.

(*d*) *Wason v. Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 8 B. & S. 671.

CHAPTER VIII reports, the presumption of malice is negatived in the one case, as in the other, by the fact that the publication has in view—not the defamation of the individual concerned, but the instruction and advantage of the public.

CHAPTER IX.

PUBLICATIONS MADE IN THE COURSE OF NAVAL AND MILITARY PROCEEDINGS.

<i>Naval or Military Officer acting in discharge of duty. Courts Martial and Military Courts.</i>	<i>Defamatory communications by military Officers to their Superiors. Witnesses giving evidence in Military Courts.</i>
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CHAPTER IX.

Naval or Military Officer acting in discharge of duty.

By analogy to the case of Judges and Jurors, it appears that no action will lie for a Naval or Military officer, or subordinate, against his Commander, or Superior officer, for acts done in the course of duty or discipline. Naval and military matters between naval and military men, being properly for naval and military tribunals to determine; and when properly brought within the true limits of naval or military jurisdiction, cannot be questioned in the civil courts (a). The immunity in these cases rests upon grounds of public policy and convenience; the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and safety of the State depend (b).

But acts done under colour of naval or military authority and in abuse or excess thereof, out of spite, and without any reasonable or probable cause, are not within the principles and privileges above stated (c).

Certain charges having been preferred by the plaintiff against an officer of his own regiment; the Court Martial, after acquittal, subjoined the following declaration:—"The court cannot pass, without observation, the malicious and groundless accusations that have been produced by Captain J. against an officer whose character has during a long period of

(a) See *Johnstone v. Sutton*, 1 T. R. 493; in *Error* 510; see also *Grant v. Gould*, 2 H. Blac. 69.

(b) *Hart v. Gumpach*, 9 Moo. P. C.

C. (N. S.) 277; 42 L. J. P. C. 35.

(c) See *Warden v. Bailey*, 4 Taunt. 67; Same in error, 4 M. & S. 400.

service, been so irreproachable as Colonel Stewart's; and the court do unanimously declare that the conduct of Captain J. in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service." For this the plaintiff brought his action against Sir J. Moore, the President of the Court Martial. Upon the trial of the cause before Sir J. Mansfield, C.J., it appeared, that the alleged libel formed part of the opinion of the court, delivered by the defendant to the Judge Advocate, for the purpose of being submitted to the King, and immediately followed the declaration of the opinion of the Court Martial,—“that he, the aforesaid Colonel Richard Stewart, is not guilty of either of the charges, and the court do most fully and honourably acquit him.” The plaintiff was nonsuited: and afterwards a new trial was refused, on the ground that the words complained of formed part of the judgment of acquittal (*d*).

A military court of inquiry duly instituted by the Commander-in-Chief of the army, under the Articles of War, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted, and recognised in the Articles of War, and in Acts of Parliament. And where the Commander-in-Chief of the army having directed an assemblage of commissioned military officers to hold an inquiry into the conduct of a commissioned officer in the army, and such officer having sued the president of the inquiry for damages for a libel, stated to be contained in the report made by the president thereon; it was held, that the report was a privileged communication, and not admissible in evidence on the trial of such an action (*e*).

And where the plaintiff brought three separate actions against three members of a military court of inquiry, charging in each that the defendant confederated and conspired with other persons, by falsely and maliciously, and without any reasonable or probable cause, representing to the Commander-in-Chief that the plaintiff was unfit to command in his regiment, and that his command was not beneficial to the service; whereby the plaintiff was deprived of his rank and commission in the army: the court stayed the actions, on affidavits by each of the defendants, that the actions were

Actions against
members of
Military Court
stayed.

(*d*) *Jekyll v. Sir J. Moore*, 2 B. & P. N. R. 341.

(*e*) *Home v. Lord Bentinck*, 2 Brod. & Bing. 130.

CHAPTER IX. brought solely in respect of official and judicial acts by them as members of a military court of inquiry (*f*).

Defamatory
communica-
tions by
Military
Officers to their
Superiors, as
to conduct,
competency,
&c., of subor-
dinate.

An action at law will not lie against an officer in the army for libellous statements contained in official reports made in the discharge of his duty as such officer, or under the obligation of military duties, touching the military conduct, competence, or other qualifications of an officer under his command: though alleged to have been made maliciously and without reasonable or probable cause. The only remedy for a wrong done by a commanding officer to an inferior in the discharge of military duty, is the redress provided by the articles of war.

And so where the plaintiff, a military officer, had been arrested under orders from the defendant (his commanding officer), with a view to his trial by court martial; and during his arrest the defendant sent to the civil court, before which the plaintiff was applying to be discharged, a certificate which was relevant to the question before it, but might tend to prevent his discharge, and might be deemed defamatory: it was ruled by Willes, J., to be insufficient, either as evidence of malice or to support an action of libel (*g*). And where the plaintiff in an action of libel, alleged that he was an officer and lieutenant-colonel in the army, and was entitled to certain emoluments in respect thereof, and the defendant published of him as such officer, &c., certain libellous statements contained in letters (which letters were set out at length in the declaration), and alleging as special damage, loss of office and emolument: the defendant pleaded, in substance, that at the time of writing and publishing the matter complained of, he was the superior military officer of the plaintiff, and the plaintiff was under his command, and that it was his (defendant's) duty as such superior officer to forward to the adjutant-general certain letters from time to time, received by him as such superior officer from the officers under his command, and to report thereon in writing to the said adjutant-general for the information of the Commander-in-Chief; that the defendant having received such letters from the plaintiff, made reports thereon and forwarded the same in the ordinary course of his duty as such superior military officer, to the adjutant-general, which letters and reports so received and forwarded, &c., were the

(*f*) *Dawkins v. Prince Edward* of 45 L. J. 567.

Saxe-Weimar, Same v. Wynyard, (*g*) *Keightly v. Bell*, 4 F. & F. 763.
Same v. Stephenson, 1 Q. B. D. 499;

libels complained of: to which plea the plaintiff replied, that the words in the declaration mentioned were written and published by the defendant of actual malice and without reasonable, probable, or justifiable cause, and not *bonâ fide*, or in the *bonâ fide* discharge of the defendant's duty as such superior officer, as in the plea alleged. And it was held, by the majority of the court, that the replication was bad; that the defendant's plea was an answer to the action; and that even though the words were published of actual malice and without any reasonable or probable cause, yet that, inasmuch as both plaintiff and defendant, as officers in the army, were bound by the articles of war, and the matter complained of arose in the course of duty, it was purely of military cognisance, and the plaintiff had no remedy at law (*h*). But Cockburn, L.C.J., who differed said:—"While I fully agree that acts done in the honest exercise of military authority are entirely privileged, I confess that I am not prepared to arrive at a conclusion so startling and apparently unjust, as that if the opportunity it affords is intentionally abused for the purposes of injury and wrong, no redress is to be had by a sufferer, in a court of law" (*i*). And after referring to the case of *Sutton v. Johnstone* (*supra*), particularly to the judgment of the Court of Exchequer delivered by Eyre, B., in that case; and also to the case of *Warden v. Bailey* (*supra*), proceeded to say:—"I cannot bring myself to think that it is essential to the well-being of our military or naval force, that where authority is intentionally abused for the purpose of injustice or oppression, where charges are preferred which, to the knowledge of the party preferring them, are unfounded and unjust, where representations are made which the party making them knows to be slanderous and false, the party injured, whose professional prospects may have been ruined, and whose professional reputation may have been blasted, is to be told that the Queen's Courts in a country whose boast it is that there is no wrong without redress, are shut to his just complaint. On the contrary, I cannot but

CHAPTER IX.

Conflict of
judicial
opinion.

(*h*) *Dawkins v. Lord Fredk. Paulet*, 9 B. & S. 768; L. R. 5 Q. B. 94; 39 L. J. Q. B. 53, per Mellor, Lush, and Hayes, JJ. (Cockburn, L.C.J. *dissentiente*). This case afterwards stood for argument in the Exchequer Chamber, but owing to the death of the defendant, the plaintiff was prevented from proceeding with it.

(*i*) See also per Lord Campbell, C.J., *Dickson v. The Earl of Wilton*, 1 F. & F. 419; and Mr. Justice Stephen, in his "Digest of the Criminal Law," page 191, note 6, expresses a doubt whether the privilege would be extended beyond the case of military duty.

CHAPTER IX. believe that to a force depending on voluntary augmentation, it will be far more beneficial that its subordinate members shall know that, against intentional oppression and manifest wrong, leading to consequences disastrous to professional interests or character, redress may be found at the civil tribunals of the country" (k).

Witness giving
evidence in
Military
Court.

A military man, giving evidence before a military court of inquiry having no power to administer an oath, is nevertheless entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial proceeding. And, therefore, where the plaintiff, an officer in the army, having made certain complaints, and brought certain charges against his brother officers; the commander-in-chief directed that a court of inquiry be assembled for the purpose of investigating the matters complained of, and of reporting thereon to the commander-in-chief. A court of inquiry was accordingly duly constituted and assembled; at which the defendant, an officer in the army, was required to and did attend as a witness, and was examined *vivâ voce* by the plaintiff, and by the court; and after the close of his examination, and without any request by the court or the plaintiff, he handed in to the court a written statement containing in substance a repetition of the *vivâ voce* evidence he had given, with some additions thereto, and the same was received by the court. A report was afterwards made by the court to the commander-in-chief; and the plaintiff applied for a Court Martial upon the defendant for such his conduct towards him, which, however, was refused: whereupon the plaintiff brought an action against the defendant for slander and libel, alleged to have been contained respectively in the *vivâ voce* statements made to the court, and in the written statement handed in at the close of the inquiry. At the trial, before Blackburn, J., it was ruled by that learned judge, that the action would not lie, if the verbal and written statements complained of were made by the defendant (a military man), in the course of a military inquiry in relation to the conduct of the plaintiff (also a military man), and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted *malâ fide*, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false. To this ruling a bill of

Voluntary
Statement in
writing by
witness handed
up to the
Court.

(k) *Dawkins v. Paulet*, 39 L. J. Q. B. 62.

exceptions was tendered; and it was *held*, by the unanimous judgment of the Court of Exchequer Chamber, that the ruling of the learned judge at the trial was right, and that the exception must be disallowed (*l*). Upon this judgment error was brought to the House of Lords; where it was held, that a long series of decisions have settled, that no action will lie against a witness for what he says or writes in giving evidence before a court of justice, such statements or writings having reference to the inquiry before the court. That upon all principles, and upon all considerations of convenience and of public policy, the same protection which is extended to a witness who has been examined upon oath in a judicial proceeding, ought to be, and must be, extended to a military man called before a court of inquiry, in pursuance of the Queen's regulations and orders for the army, for the purpose of testifying there upon a matter of military discipline connected with the army, such testimony being relative to that inquiry (*m*).

It will thus be seen that the judgment of the Exchequer Chamber was affirmed by the House of Lords, but upon the point *only* that the same protection which is extended to a witness in a judicial proceeding, should be extended to a military man in giving evidence before a court of inquiry upon a matter of military discipline. The great question as to whether a military man against whom a charge has been brought by his superior officer, which the latter knows to be false and malicious, and made without any reasonable or probable cause, and from which special damage has resulted, has a right of action in the civil courts, is therefore yet open to final decision by a court of last resort. The question has several times been before the Courts, as appears from the cases already mentioned, in which eminent judges have differed in opinion. And so the question stands at present, as having been decided both incidentally and by the majority of the court in the case of *Dawkins v. Paulet*, that a military man is, under such circumstances, without redress in the courts of law. There has, however, been no decision of the House of Lords to that effect. Certainly the point was not decided in the case of *Sutton v. Johnstone* (*supra*), nor in that of *Dawkins v. Rokeby* (*n*).

(*l*) *Dawkins v. Lord Rokeby*, L. R. Q. B. 8.

8 Q. B. 255; 42 L. J. Q. B. 63.

(*n*) See the observations of the Lord Chancellor (Cairns) that, their lord-

(*m*) *Ibid.*, 7 E. & I. Ap. 744; 45 L. J.

CHAPTER IX.

Publication of
notice, by
Secretary of
State, as to
ineligibility of
military officer.

Upon the authority of the preceding cases, it has been held, that no action of libel will lie against the Secretary of State for India, for the publication in the Indian Gazette of an order for the removal of a military officer from the Indian Army to the pension list, on the ground (alleged) of his being ineligible for public employment; the publication having been made by the Secretary of State in the exercise of his duty as such, and in pursuance of certain Government orders and regulations applying to military service, and therefore not within the cognisance of a court of law, or at all events not unless the publication was made falsely and maliciously, and without any reasonable or probable cause (o). And in a subsequent case it was held, that a communication, in writing, made by the Secretary of State for India to the Under Secretary, in the course of his official duty; although containing untrue statements affecting the professional reputation of the plaintiff, a captain in H. M. Indian Staff Corps, is absolutely privileged, and cannot be made the subject of an action of libel (p).

CHAPTER X.

COMMUNICATIONS ON MATTERS OF PUBLIC INTEREST.

Reports of Proceedings at Public Meetings.

Statutory Privilege as to Newspaper reports of.

Conditional Privilege as to reports of Public Meetings.

Fair Comments on matters of public interest.

Restrictions on free discussion.

Newspaper Comments on the public conduct of public men.

Bona fide belief of the writer no defence.

Reviews and Criticisms of Books, and other literary publications.

Extent to which liberty of criticism allowed.

Criticisms on performances at places of public entertainment.

Criticisms on works of Art, &c.

Publications in vindication of character.

CHAPTER X.

Reports of
proceedings
at public
meetings.

UNTIL recently there was no legislation on this branch of our subject; nor was there any privilege at law to publish reports of the proceedings of public meetings. The rule of

ships would not desire their decision to go farther than the circumstances of that particular case would warrant: 7 E. & I. App. 754; 45 L. J. Q. B. 13.

(o) *Grant v. The Secretary of State*

for India, 2 C. P. D. 445; 46 L. J. 681.

(p) *Chatterton v. Secretary of State for India in Council* (1895), 2 Q. B. D. 189; 64 L. J. 676.

law which allowed, under certain conditions, the publication of fair and accurate reports of the proceedings of courts of justice, did not extend to reports of the proceedings of public meetings. And, accordingly, it was held to be no defence to an action for a libel published in a newspaper, that the alleged libel was a true, faithful, and correct report of the proceedings at a public meeting held under the authority of a local act for the improvement of a town (a). And the publication, even of a correct report, of the proceedings at a parish vestry meeting was not privileged as a matter of public interest (b). Nor were reports of proceedings at meetings of boards of guardians (c).

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In the year 1881 a statute was passed (d) conferring, by section 2 thereof, privilege (under certain conditions) to newspaper reports of the proceedings of public meetings. But after the lapse of a few years that section was repealed, and another substituted by the legislature, in the "Law of Libel Amendment Act, 1888" (e). By section 4 of the last-mentioned statute it is enacted that—"a fair and accurate report, published in any newspaper, of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence

(a) *Davison v. Duncan*, 7 E. & B. 231, and S. C. *nom. Davidson v. Duncan*, 26 L. J. Q. B. 104.

(b) *Popham v. Pickburn*, 7 H. & N. 897 31 L. J. Ex. 133.

(c) *Purcell v. Sowler*, 2 C. P. D. 215; 46 L. J. 308; *Pierce v. Ellis*, 6 Ir. C. L. R. 65-6.

(d) 44 & 45 Vict. c. 60.

(e) 51 & 52 Vict. c. 64, s. 4.

CHAPTER X. in any proceedings, if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected

Public concern. to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit."

Public meeting, what is a. It is also provided that, "For the purposes of this section 'public meeting' shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

Under this statute, the report of any statement made at a meeting of Shareholders of a Company which is strictly confined to a discussion of the company's financial position is privileged. But it does not follow that all that was said in the course of a speech on the affairs of the company would be protected (f).

Conditions of the privilege. The statute confers only a conditional privilege. In the first place the report must be "fair and accurate": and therefore when challenged in an action of libel as unfair and inaccurate, such will be a question for the jury.

2ndly. The report will not be privileged if it was published or made maliciously. This also will be a question for the jury.

3rdly. The report must not contain any blasphemous or indecent matter.

4thly. The privilege will not be available as a defence if the defendant has been requested, and has refused or neglected, to insert in the newspaper in which the report appeared, a reasonable letter or statement of contradiction or explanation of such report. But as to this condition, a plaintiff is not bound to request the insertion of any such a letter or statement; nor is the defendant required to insert any such without request.

And 5thly. The privilege does not extend to the publication of any matter that is not of public concern, and the publication of which is not for the public benefit.

(f) Per Mathew, J., in *Ponsford v. Financial Times*, 16 T. L. R. (1900), p. 248.

As to this last condition, it is made a question for the jury, under the direction of the judge, as to whether or not the matter complained of was of public concern; and so also as to whether or not the publication thereof was for the public benefit.

CHAPTER X.
Conditional
privilege as to
reports of
public
meetings.

Unless the matter is of public concern and published for the public benefit, the Amendment Act affords no protection (*g*).

If the report contain matter that is *false*, as well as defamatory of the plaintiff, it will be difficult to show that the publication thereof was for the public benefit. And it cannot be for the public benefit that false and unfounded accusations against individuals should be promulgated at a public meeting for the purpose of publication in a newspaper. As in the case of a defence which was raised under the (now repealed) section of the statute of 1881 (*h*) to an action against the proprietor of the 'Manchester Courier,' for libel contained in a report in that newspaper, of a speech delivered at a political meeting at Manchester, at which the speaker made a violent attack upon the plaintiff, who was not present at the meeting, and who had nothing to do with the election at Manchester, but who was a candidate at the time for a London constituency, imputing to him atheism and blasphemy; it was held, to be a question for the jury whether the publication of that speech in the defendant's newspaper was for the public benefit; and it was also held, that it could not be for the public benefit that unjustifiable accusations against individuals, entirely irrelevant to the subject of the meeting, and introduced by the speaker, only for the purpose of defaming a person not present at the meeting, should be published in a newspaper, or in any other form of publication (*i*).

It will be seen that the Amendment Act of 1888 extends to various other meetings, of a *quasi* public nature; as the meetings of a parish vestry, town council, &c. As to these, however, if neither the public nor any newspaper reporter is admitted thereto, there is no privilege under the statute to report the proceedings. But if the public are not excluded, a fair and accurate report of the proceedings published in a newspaper is privileged, upon the same conditions as a report of a public meeting.

(*g*) *Ponsford v. Financial Times* (1900), 16 T. L. R. 248; and see *Venables v. Fitt*, 5 T. L. R. 83; *Kelley v. O'Mally*, 6 T. L. R. 62.

(*h*) 44 & 45 Vict. c. 60, s. 2.

(*i*) *Pankhurst v. Sowler*, 3 Times L. R. 193, per Huddleston, B., and Manisty, J.

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It will be observed that the section above stated applies only to reports published in a newspaper; and therefore a report of a public meeting published in the form of a pamphlet, or circular, would not be within the section. Nor would a report published in the form of a reprint or extract from a newspaper.

Speaker
reporting his
own speech.

Where a person who made a speech at a public meeting assumed to himself the character of a reporter of his own share of the proceedings, it was held an unprivileged communication, not being a fair report of the whole proceedings of the meeting (*k*). And if a person, having made a public speech, give a copy of it to another to publish, he is answerable as a publisher of it (*l*). But if the occasion of publishing his speech be in vindication of his character when unjustifiably attacked, such publication may be justified on that ground (*m*).

Official notices
and reports.

The section also includes within the privilege it confers, the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by either of them for the information of the public.

As to
comments on
matters of
public interest.

The Act does not apply to seditious libel, and therefore a defendant charged with such will not be allowed to avail himself of the provisions of the statute and plead that the matter complained of was fair comment, published without malice (*n*). The rule of the common law which allows full freedom of comment and discussion to writers upon matters of public interest does not extend to imputations upon personal character. In the absence of any duty recognised by law in the person publishing them, there is no privilege, statutory or otherwise, such as will exonerate the author or publisher of a defamatory communication of the kind from the consequences attendant on the publication of a libel.

Conflicting
decisions.

There are, however, conflicting decisions on the subject (*o*), though chiefly in cases at *Nisi Prius*; from which it would appear that the publication of statements defamatory of individuals may be privileged by the occasion, as comments upon matters of public interest, if published without malice and in

(*k*) *Pierce v. Ellis*, 6 Ir. C. L. Rep. (N. S.) 55.

(*l*) *Parkes v. Prescott and another*, L. R. 4 Ex. 169; 38 L. J. Ex. 105.

(*m*) See *Laughton v. The Bishop of Sodor and Man*, *infra*, p. 156.

(*n*) *Reg. v. McHugh* (1901), 2

Q. B. D. (Ir.) 569.

(*o*) *Vide Henwood v. Harrison*, *infra*, p. 142; *Turnbull v. Bird*, 2 F. & F. 524; *Hunter v. Sharpe*, 4 F. & F. 983, per Cockburn, L.C.J.; *Harle v. Catherall*, 14 L. T. (N. S.) 801, per Martin, B.

the *bonâ fide* belief of their truth. But it is submitted that those decisions cannot now be supported. CHAPTER X.

In considering this branch of our subject, it is important to bear in mind the rule of the common law as applied to the term "privilege." The only privilege is that which is derived from the subject-matter alone, without regard to any relation between the parties. The word "privilege," as expressed in some of the reported cases prior to the statute, appears to have been used somewhat loosely, or in a popular rather than a legal sense, as applied to communications which are not, properly speaking, privileged. The meaning of the word when used to indicate protection to a defamatory communication is—that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else (*p*). Communications that are privileged are those which are made by persons in the discharge of a duty, public or private, social or moral, or in the interest of the party by or to whom they are made.

The term "privilege" cannot be extended so as to cover misstatements of fact, however *bonâ fide* they may be made. The occasion being privileged, the extent of the privilege may vary, according to the nature of the case and the limits of the right or duty, which is the basis of the privilege. And this is precisely the position in the case where the right exercised is one shared by the rest of the public, and not one limited to an individual or a class (*q*). Proof of malice may take a criticism *primâ facie* fair, outside the right of fair comment, just as it takes a communication *primâ facie* privileged outside the privilege (*r*).

Where, therefore, an action of libel is founded on a comment in a public newspaper, upon a matter of public interest, the question for the jury is, whether or not the publication complained of is a libel upon the plaintiff: and if it contains imputations on private character, it exceeds the limits of fair comment, and is to that extent libellous (*s*).

As to what is fair comment upon matters of public interest, where the jury found expressly that the publication complained of was not fair comment on a matter of public interest, that it was a libel and published maliciously, a verdict for the plaintiff was upheld (*t*).

(*p*) *Vide* per Blackburn, J., 3 B. & S. 780.

(*q*) *Thomas v. Bradbury, Agnew & Co., infra.*

(*r*) *Ibid.*

(*s*) *Vide Hewson v. Cleve* (1904), 2 K. B. D. (Ir.) 536.

(*t*) *Fisher v. Nation Newspaper Co. and another* (1901), 2 Q. B. D. (Ir.) 465.

Meaning of "privilege" as applied to defamatory communications.

No privilege for misstatements of fact.

Fair comment on matters of public interest.

CHAPTER X.

Comments
upon literary
works.

Comment that is malicious cannot be fair: and therefore, on proof of malice, the defence of fair comment fails (*u*). And comment, in order to be fair, must be based upon facts (*x*).

Fair comment upon a literary work or other such production is not a libel; and in the absence of evidence of malice, irrelevancy, or unfairness, the case should not be submitted to the jury (*y*).

In the case of a criticism of a literary production, or of a trade advertisement, or of a public man, if the writer goes on to make imputations disparaging to character, whether as author or public man; there being no facts to warrant the imputations, the defence of "fair comment" cannot be sustained. In such a case the criticism ceases to be a fair comment and becomes a defamatory libel (*z*).

What are
matters of
public interest.

The class of communications which may be ranged under the head of matters of public interest are numerous; and include matters of national concern, such as the affairs of State, the Government, the Ministry, the Army and Navy, the proceedings of Parliament, and of Courts of Justice, the Church, national and public institutions, the public acts of public men—as ministers, generals, judges, and others. Of the same class are reviews and criticisms of books, and other literary and scientific productions; theatrical, musical, and other public performances; and generally, all other public matters which concern the welfare of the people and the well-being of society in general. So too, a matter may become a subject of public interest if it be one to which public attention has been invited, either by the plaintiff himself or by his conduct in relation thereto. And, in fact, any matter that is brought before the public in such a manner as to invite criticism or public attention, is fairly open to the comments and criticisms of a public writer.

Sanitary
condition of a
village.

The sanitary condition of a large number of cottages in a mining village, occupied by working miners and their families, is a matter of public interest, and may be the subject of fair comment in a newspaper (*a*).

But the decisions of the stewards of the Jockey Club, though of interest to a section of the public, are not of such general

(*u*) *Thomas v. Bradbury, Agnew & Co.*, 2 K. B. (1906), C.A. 627.

(*x*) *Digby v. Financial News*, 1 K. B. (1907), 502, C.A.

(*y*) *McQuire v. Western Morning News Co.*, C.A. (1903), 2 K. B. 100.

(*z*) *Joynt v. Cycle Trade Publishing Co.* (1904), C.A. 2 K. B. 292.

(*a*) *South Hetton Coal Co., Ltd. v. The North-Eastern News Association, Ltd.* (1894), 1 Q. B. 133; 63 L. J. 293.

public interest as to render the occasion of the publication CHAPTER X.
privileged (b).

It is competent to all the subjects of the King freely but Restrictions on free discussion.
temperately to discuss, not only in conversation between friend and friend, but through the medium of the press, every question connected with public policy ; but in proportion to the importance and delicacy of the subject, in proportion to the peril which may attend an inflamed discussion of a subject, a guard is to be imposed upon the speaker or writer at the time he is indulging in the freedom of discussion : in order that no collateral mischief arises out of what he publishes : he must take care that he does no material injury to private feeling, or the public peace and happiness. Subject to this restriction, the law of England allows every man to publish what he pleases. He must however be cautious that he does not make this privilege a cloak to cover a malicious intention (c).

The editors, publishers, and proprietors of newspapers are Editors and publishers of newspapers, privilege of.
privileged in commenting upon and discussing fully and freely all public questions, and matters of general public interest. But there is no privilege attaching to the editor of a public newspaper beyond that of any other person, to discuss and comment upon such matters, nor upon the public acts or writings of others (d). They may denounce a fraud, if such has been committed upon the public, or attempted ; and they may warn the public against that fraud ; but they must not defame private character, nor charge individuals with fraud or other misconduct, unless prepared to prove and establish it in a court of justice (e).

If a writer in a newspaper or other publication, in com- Newspaper comments containing imputations on private character
menting upon a matter of public interest, make imputations on the characters of individuals which are false and libellous, such are beyond the limits of fair comment ; and it is no defence that he *bonâ fide* believed them to be true (f). And so where the plaintiff, a Protestant dissenting minister, having publicly announced in a publication, called "The British Ensign," a scheme he had in hand for converting the Chinese

(b) *Hopie v. l'Anson and another* (1901), 18 T. L. R. 201.

(c) See *Rea v. Leigh Hunt and another*, 31 How. St. Tr. 407, per Lord Ellenborough, C.J.

(d) *Campbell v. Spottiswoode*, 32 L. J. Q. B. 185.

(e) Per Kelly, L.C.B., in *Rubery v. Grant and another*, Sit. Lon. Mich. Term, 1874, MS.

(f) *Campbell v. Spottiswoode*, 3 B. & S. 769 ; 32 L. J. Q. B. 185 ; and see *Joynt v. Cycle Trade Publishing Co.* (1904), C.A. 2 K. B. 292.

CHAPTER X. to Christianity; a writer in the *Saturday Review*, in commenting on the scheme, imputed to the plaintiff that in putting forward such a scheme, he was acting the part of an impostor, that his only object was to put money into his own pocket by obtaining contributions to his newspaper, for the alleged purpose of promoting the cause of Christianity among the heathen; and the writer charged, that the plaintiff, in furtherance of his object, published as genuine, fictitious correspondence, and imputed that, with a view to inducing persons to contribute towards his professed sacred cause, the plaintiff published a fictitious subscription list. The jury found a verdict for the plaintiff, with damages; but they also found that the writer of the article *bonâ fide* believed the imputations to be well-founded: it was held, that the *bonâ fide* belief of the writer in the truth of the imputations was no defence to the action (g).

And Crompton, J., in the course of the argument, said:—"The argument of the defendant assumes a privilege: a privilege is a right in a particular person to do a particular thing which no one else otherwise circumstanced has. Thus in giving a character to a servant, the master has a particular privilege of saying what he believes to be true, whether true or not; that is a privilege. But there is no particular privilege in a writer in a public journal beyond that possessed by every one, of freely discussing a public matter" (h). And per Cockburn, L.C.J.:—"I agree that when what would be *primâ facie* a libel is shown, and a privilege is established on the part of the defendant, the plaintiff must show express malice; which no privilege will excuse. But how does any privilege arise here? A writer in a public paper may comment on the conduct of public men in the strongest terms; but if he imputes dishonesty, he must be prepared to justify" (i).

Report of
Board of
Admiralty
upon the
plans and
proposals of
a Naval
Architect.

Following this case was that of *Henwood v. Harrison*, in which a report of the Board of Admiralty upon the plans of a naval architect, submitted to the Lords of the Admiralty for their consideration, was held by the majority of the court to be a matter of public, and even national, interest, such as to excuse, on the ground of privilege, the publication of such report in the form of a Parliamentary Blue-Book,

(g) *Campbell v. Spottiswoode*, *supra*. S. 780.

(h) 32 L. J. Q. B. 195-6, and see (i) *Ibid.*
per Blackburn, J., in the same, 3 B. &

even before the same had been submitted to Parliament. And so, where the plaintiff, a naval architect, having made and submitted to the Lords of the Admiralty for their consideration certain proposals, accompanied by plans, for converting wooden line-of-battle ships into sea-going turret-ships, the Comptroller of the Navy, in a report upon the same to the Board of Admiralty in September, 1867, wrote:—"These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late Chief Constructor of the Navy. Their Lordships may therefore see fit to send a copy of this correspondence confidentially to that gentleman, in order that he may have an opportunity of offering to their Lordships any explanation which he may consider desirable in regard to it. To Mr. Henwood himself (the plaintiff) I think it is only necessary to say, that their Lordships have had the whole question reconsidered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan, and I beg leave to submit that he be so informed." In September, 1870, an ironclad turret-ship, named "The Captain," capsized at sea, and sank with all hands. The disaster caused considerable public excitement and anxiety at the time; and with a view to explain the circumstances under which "The Captain" had been sent to sea, as well as the general course pursued by the Board of Admiralty with reference to placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the First Lord of the Admiralty for presentation to Parliament during the then coming session. This minute referred to and criticised the plans of the plaintiff, and set out the before-mentioned report of the Comptroller upon the same. The minute was, by order of the Lords of the Admiralty, printed by the defendant, the Queen's printer, in the form of a Blue-Book, copies of which were sold by him to the public, *before the meeting of Parliament*. At the trial of an action for the alleged libel of the plaintiff in his business of naval architect, it having been conceded that the publication was *bonâ fide* and without malice; Brett, J., directed a nonsuit, on the ground that the publication in question was in the nature of a fair criticism of a proposal affecting a matter of public and national importance, and therefore privileged; and refused to leave to the jury the question whether the publication was relevant to the

Premature
publication of
parliamentary
Blue-Book.

CHAPTER X.

Petition to
Parliament
against quack
doctors :

occasion or not ; and it was afterwards held by the majority of the court (*k*) that the nonsuit was right (*l*).

Where the plaintiff, a member of the Royal College of Surgeons in London, presented a petition to Parliament against quack doctors, and praying for a prohibitory law against their being permitted to practise ; the defendant, a journalist, published an article commenting severely on the contents of the petition, and charging the plaintiff with ignorance of his profession and of chemistry ; which he said appeared on the face of the petition ; the jury having found a verdict for the defendant, the court made a rule absolute for a new trial, as it clearly appeared on the face of the libel that it imputed ignorance to the plaintiff in his profession of a surgeon (*m*).

against grant
of money to
Roman Catholic
College.

And it has been held that the publication of a written document containing matter defamatory of a Roman Catholic priest, in his office as such, could not be justified on the ground that it was promulgated at a public meeting called to petition Parliament against making a grant in support of a Roman Catholic college (*n*).

Report of a
political
committee.

A report published in a newspaper by a political committee, containing imputations of bribery against persons concerned in a parliamentary election, was ruled by Hill, J., not privileged ; and that the rule of law allowing the discussion of matters of public interest did not extend to imputations on personal character ; and that it was a question for the jury whether or not the report was a libel reflecting on the character of the plaintiff (*o*).

The patronage
of Parliament
is matter of
public interest.

The patronage of Parliament as bestowed upon the supporters of the ministry, is matter of public interest, and may be the subject of fair comment. But if the writer assert that a certain member of Parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did, but for a corrupt understanding that he should receive a reward, such would not be excusable as fair comment (*p*).

The Address
of a Candidate
for Parliament.

The address of a candidate for Parliament, to the electors, is

(*k*) Willes, Byles, and Brett, JJ. 719, 726.
(Grove, J., *dissentiente*).

(*l*) *Henwood v. Harrison*, L. R. 7
C. P. 606 ; 41 L. J. C. P. 206.

(*m*) *Dunne v. Anderson*, 3 Bing. 88,
and see per Best, C.J., at the second
trial, Ry. & Moo. 287.

(*n*) *Hearne v. Stowell*, 12 A. & E.

(*o*) *Wilson v. Reed and others*, 2 F.
& F. 149, and *vide Dickeson v.*
Hilliard, 43 L. J. Ex. 37, *infra*,
p. 192.

(*p*) *Seymour v. Butterworth*, 3 F. &
F. 377, per Cockburn, L.C.J.

a matter of public interest, and may therefore be the subject of a fair and *bonâ fide* comment. But a statement published in a newspaper, by a voter, reflecting on the character of a candidate who comes forward to represent a borough in Parliament, is not a privileged communication: and per Lord Denman, C.J., "However large the privilege of the electors may be, it is extravagant to suppose that it can justify the publication to all the world, of facts injurious to a person who happens to stand in the situation of a candidate" (q).

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Newspaper reflections on the character of a candidate.

In an action for slander of the plaintiff in his character of candidate for a parliamentary constituency, imputing to him that he was an assassin and a murderer, and had murdered his own father: after verdict for the plaintiff with damages £2,000, it was argued (on writ of error) that the words being alleged to have been spoken of the plaintiff in his character of candidate for parliament, and having been spoken only to plaintiff's constituents, were privileged. But the court held, that if the words were actionable in themselves it was quite immaterial whether they were spoken of him as a candidate or not. That it would be a strange doctrine indeed, that when a man stands for one of the most honourable situations in the country, any person may accuse him of any imaginable crime with impunity. And the judgment was upheld by the Court of Exchequer Chamber, which judgment was afterwards affirmed by the House of Lords (r). And where a speech had been made by one Chesters Thompson at a political meeting, containing charges of atheism and blasphemy against the plaintiff, who was a candidate for Parliament; the defendant afterwards publicly read at a meeting of the constituents for whose suffrages the plaintiff and defendant were rival candidates, extracts from the speech, and also published the same in the form of placards, handbills, and slips; the jury were directed that in the absence of any justification that the charges were true there was no privilege such as would justify the defendant in publishing them (s).

Slander of a candidate for Parliament.

The printed report of a public institution is a matter of public interest, and the publication thereof in a newspaper may be privileged, if it be published fairly, and with the honest purpose of affording to the public information upon a matter in which they are interested. And accordingly, where a printed

Report of a Public Institution with comments thereon.

(q) *Duncombe v. Daniell*, 8 C. & P. R. 47, 54.
222.

(s) *Pankhurst v. Hamilton*, 3 Times

(r) *Harwood v. Astley*, 1 B. & P. N. L. R. 500, per Grove, J.

CHAPTER X. report of an inspector of charities, under the "Charitable Trusts Act," contained, among other subjects, a letter complaining of overbearing conduct and inefficiency in one of the officers of the institution, and praying the dismissal of such officer to avert the impending destruction of the institution: the whole report was a long time afterwards published by the defendant in his newspaper, together with a leading article upon the subject. Cockburn, L.C.J., ruled, that *primâ facie* the publication was libellous, but that it was a question for the jury whether under the circumstances it was privileged as a publication and fair comment upon a matter of public interest; and they would have to say—1st, whether it was a matter which it interested the public to know; and 2ndly, did the defendant publish it with a view to afford information upon a matter in which the public were interested, and did he do so in the honest desire to afford that information, or with a sinister motive (t).

The management of a Parish Charity.

But the conduct and management of a parish charity, by the minister of the parish, is not a matter of general public interest; nor is it a lawful subject of public comment in a newspaper; and there is no privileged occasion such as will furnish a lawful excuse for the publication of false and injurious matter reflecting on the minister in relation to such charity (u).

Publications defamatory of a Religious Community.

Nor is it lawful to publish anything defamatory of a private society or religious institution. As in the case of the Scorton Nunnery, where the defendant was convicted of publishing a libel with intent to defame and vilify a certain religious order or community called "Scorton Nunnery," and certain persons (naming them), being the Lady Abbess and nuns of the said order, and certain other persons being the chaplains thereof (x). And such societies are themselves liable if they publish defamatory matter of individuals. Any self-constituted body, which sets itself up for the reform of the public, whether in religious, commercial, or political points of view, must be cautious in all their publications and writings concerning private individuals, not to reflect on private character (y).

Conduct of a clergyman in matters relating to his Church.

The conduct of a clergyman in cooking and taking his meals

(t) *Cox v. Freney*, 4 F. & F. 13; vide *Allbutt v. Medical Council*, *supra*, p. 107.

(u) *Gathercole v. Miall*, 15 M. & W. 319, 328.

(x) *Reg. v. Gathercole*, 2 Lew. Cr. Ca. 237.

(y) Per Hill, J., in *Wilson v. Reed and others*, 2 F. & F. 149.

in the vestry, and causing books to be sold in the church during Divine service, are matters of public interest; and may lawfully be the subject of public comment within the boundaries of fair criticism (z). But to publish of a clergyman of the Church of England that he came to the performance of Divine service in a towering passion, and that his conduct was calculated to make infidels of his congregation, is libellous (a). So also to publish of a clergyman that he had desecrated a portion of the church by converting it into a cooking apartment (b).

The appointment by the Master of the Rolls, of a Roman Catholic gentleman to make a calendar of certain State papers at the Record Office, is a matter of public interest, and may be the subject of fair criticism. The plaintiff, a Roman Catholic, held a temporary appointment in the Public Record Office, as Calendarer of Foreign State Papers; the defendant was the secretary to a society called "The Protestant Alliance." The alleged libels were contained in certain letters published in a newspaper by the defendant, who professed to have written and published them in his capacity as secretary to the above society. The matter complained of in the letters, was that which imputed to the plaintiff, that by reason of his religious views as a Roman Catholic, and his opinions and writings on matters of history, he would be likely to and was capable of interpolating, mutilating, and destroying some of the State papers entrusted to his care as such Calendarer; that whilst the State papers were in the plaintiff's hands they were in jeopardy; that their custody was not safe; that the "Protestant Alliance" entertained grave doubts as to their security; that there was real ground for apprehension of danger to the records; that in a work in the Bodleian library several pages containing an account of Luther and others had been cut away and abstracted by some person of similar religious views to the plaintiff; and that certain State papers had been missing from the Record Office since the plaintiff had been engaged there; and that, as the plaintiff, when about his occupation, sat in a room by himself at the Record Office, with a *large fire*, the probability was that he *accidentally* burnt them. At the trial it was

Appointment
of Calendarer
of State Papers
at the Record
Office.

(z) *Kelly v. Tining*, 35 L. J. Q. B. (N. S.) 65.

231; 1 L. R. Q. B. 699; and see *Kelly v. Sherlock*, *infra*.

(b) *Kelly v. Sherlock*, 35 L. J. Q. B. 209; 7 B. & S. 480; 1 L. R. Q. B. 686.

(a) *Walker v. Brogden*, 19 C. B.

CHAPTER X.

Bonâ fide
belief of the
writer no
defence.

Where the
alleged facts
are untrue.

Distinction
between fair
criticism and
the assertion
of false facts.

proved that no documents of any kind had been lost or missing from the office whilst the plaintiff held his appointment there; and there was no evidence that persons of the plaintiff's opinions had ever destroyed or mutilated books or public documents of any kind. Erle, C.J., directed the jury that a man may publish defamatory matter of another holding any public employment, if it be a matter in which the public are interested; and that "the comments were justified provided the defendant honestly believed that they were fair and just" (c). But on this case being cited in argument in *Campbell v. Spottiswoode*, the ruling of Erle, C.J., was disapproved, and it was held, that if in commenting on matters of public interest, the writer impute sordid motives or dishonest conduct to the parties concerned, the *bonâ fide* belief of the writer that the imputations were well founded, affords no defence to an action of libel (d): such *bonâ fide* belief may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover, that "honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel; that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous" (e). It is the right of all the King's subjects to discuss public matters; but no person can have a right, on that ground, to publish what is defamatory, merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself (f).

The rule of law which allows full latitude to a fair and *bonâ fide* comment on a matter of public interest, does not mean that a writer may invent facts, and then comment on the facts so invented, in what would be a fair and *bonâ fide* manner, on the supposition that the facts are true (g).

There is a distinction between fair criticism on the public acts of a public man, and the assertion of false facts, and then commenting on such alleged facts. In the latter case there is no privilege, whether the defendant *bonâ fide* believed

(c) *Turnbull v. Bird*, MS. and see 2 F. & F. 524.

(d) *Campbell v. Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185.

(e) *Ibid.*, per Blackburn, J., 3 B. & S. 781.

(f) *Ibid.*, per Crompton, J., 3 B. &

S. 779; and see *Bryce v. Rusden*, 2 Times L. R. 435, per Huddleston, B.

(g) *Lefroy v. Burnside* (No. 2), L. R. (Ir.) 4 Ex. D. 556, per Palles, C.B., and see *Cooper v. Lawson*, 8 A. & E. 746.

them to be true or not. And so where the plaintiff was British resident commissioner in Zululand, and the defendants falsely charged him, in their newspaper, with specific acts of misconduct in his office as such commissioner; and then proceeded, on the assumption that the charges were true, to comment on them in defamatory language: it was held, that there was no privilege attaching to such comments: and that the publications themselves, being untrue, were not privileged, even as fair and accurate reports of actual statements made by messengers from King Cetewayo, upon a subject of public importance: nor as a report of statements made to the Bishop of Natal, and by him transmitted to the defendants (*h*).

Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact (*i*).

That criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous (*k*). A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives; unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation (*l*): and per Cockburn, L.C.J., "Public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his

Imputations of bad motives, &c., in public conduct.

(*h*) *Davis & Sons (Apprs.) v. Shepstone (Resp.)*, 11 Ap. Cas. 187; 55 L. J. P. C. 51.

(*i*) *McQuire v. Western Morning News Co.*, C.A. (1903), 2 K. B. 109.

(*k*) *Parniter v. Coupland and another*, 6 M. & W. 107, per Parke, B.

(*l*) *Campbell v. Spottiswoode*, 3 B. & S. 776; 32 L. J. Q. B. 185.

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motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, that he is therefore justified in assailing his character as dishonest" (*m*).

Comments on
conduct of
persons
attending
a political
meeting.

Fair comments, in a newspaper, on the conduct and appearance of persons attending a public meeting for the purpose of hearing the speeches and political discussions of a candidate for a seat in parliament, have been held to fall within the common law rule of privilege; and that such are not actionable in the absence of express malice, notwithstanding that the persons whose conduct forms the subject of such comments go to the meeting in a private capacity (*n*).

Reviews and
Criticisms of
Books and
other literary
publications.

As to reviews and criticisms of books and other literary productions of the day. The authors of these, in the detection and exposure of misrepresentations of fact, false inferences, vicious principles and bad taste, impose upon themselves the discharge of a difficult and responsible task; and in return are privileged in the exercise of their reasoning powers, and of their talents for wit or satire, so long as they are confined to the legitimate object, the *merits* or *demerits* of the *work* before them; and are not perverted and abused for the purposes of personal defamation, for the gratification of private malice.

In these cases, as in other matters of public interest, there is no "privileged occasion" in the sense in which that term is applied to communications that are made in the discharge of a duty. The question therefore is, not whether the criticism complained of is privileged, but whether it is a libel upon the author. It is only when the writer goes beyond the limits of fair criticism, that his criticism passes into the region of libel at all (*o*). It is not necessary, in order to give a cause of action, that actual malice on the part of the defendant should be proved. The question whether the matter complained of is, or is not actionable, depends upon whether in the opinion of the jury, it goes beyond the limits of fair criticism (*p*).

Fair criticism.

Whatever is fair, and can be reasonably said of the works of authors, or of themselves in relation to their works, is not actionable; unless it appears that under the pretext of

(*m*) *Campbell v. Spottiswoode*, 3 396; 43 L. J. C. P. 185.

B. & S. 776.

(*n*) *Davis v. Duncan*, L. R. 9 C. P.

(*o*) 20 Q. B. D. 283, per Bowen, L.J.

(*p*) *Merivale v. Carson*, 20 Q. B. D. 275.

criticism, the defendant takes an opportunity of attacking the character of the author ; in which case it will be a libel (*q*). If the critic go out of his way to attack the private character of the author, such an attack is a libel (*r*). And a man has no more right to damage unfairly the literary reputation of another than to destroy his private character.

The jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the "fairness" of the criticism by any such standard (*s*)

In *Tabart v. Tipper* (*t*), Lord Ellenborough, C.J., said, "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce *fiction* for the purpose of condemnation, he exercises a fair and legitimate right. The critic does a great service to the public, who writes down a vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people wasting both their time and money upon trash. Although, therefore, the author may suffer loss from it, such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. And Lord Ellenborough, C.J., directed the jury that, if the writer of the publication complained of, had not travelled out of the work he criticised for the purpose of personal defamation, the action would not lie ; but if they could discover in it anything *personally slanderous* against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly (*u*).

Extent to which liberty of Criticism allowed.

(*q*) *MacLeod v. Wakley*, 3 C. & P. 311, 313, per Lord Tenterden, C.J. *News Co.* (1903), 2 K. B. 100.

(*t*) 1 Camp. 350.

(*r*) *Fraser v. Berkeley*, 7 C. & P. 621, per Lord Abinger, C.B.

(*u*) *Sir Jno. Carr v. Hood*, 1 Camp. 354. And see the case of *Stuart v.*

(*s*) *McQuire v. Western Morning*

Lovell, 2 Starkie's C. 93.

CHAPTER X. Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter; whether it be the conduct of public men, or the proceedings in courts of justice, or in parliament, or the publication of a scheme, or of a literary work. But it is always to be left to a jury to say, whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed (x). An article in a newspaper commenting on matters of public interest, but imputing sordid motives and dishonest conduct to parties concerned, is beyond the limits of fair comment; and it is no defence that the writer *bonâ fide* believed in the truth of the imputations (y).

Imputations of sordid motives are libellous.

So also misdescription.

And where the reviewer is guilty of misdescription in his review, as by imputing that the authors of a stage play treat adultery cavalierly, when in fact there is no incident of adultery in the story, a jury will be justified in finding that such is beyond the limits of fair criticism (z).

Critique on Sermons.

It seems doubtful whether sermons preached in a church, but not otherwise published, may be made the subject of comment in a newspaper, so as to excuse the publication of matter injurious to the clergyman who preached them (a).

Criticisms on performances at places of public entertainment.

In respect indeed to public entertainments, the right of fair examination, as applied to the performances and the merits of actors, is part of the privilege which the frequenter of such places purchases with his ticket. It is a part of the contract which he makes with the managers, and the managers with him (b).

The Drama.

Actors.

A dramatic author is a person upon whose productions everybody has a right to comment (c). But a false imputation upon a popular actor (published in a society paper), that his old profession was that of a waiter, was found by a jury to be a libel (d).

Criticism on a musical comedy.

Where the plaintiff, an author and actor, sued the defendant company for libel in publishing in their newspaper a defamatory criticism on a musical comedy, composed by the plaintiff, and performed at a theatre at Plymouth, imputing that the plaintiff was incompetent both as actor and composer, the

(x) *Campbell v. Spottiswoode*, 3 B. & S. 778, per Crompton, J.

(y) *Ibid.*, 769; 32 L. J. Q. B. 185.

(z) *Merivale v. Carson*, 20 Q. B. D. 284.

(a) *Gathercole v. Miall*, 15 M. & W. 319.

(b) *Dibden v. Bostock and another*, 1 Esp. C. 29.

(c) *Merivale and wife v. Carson*, 20 Q. B. D. 284.

(d) *Duplany v. Davis*, 3 Times L. Rep. 184.

defence pleaded was, that the matter complained of was a fair and *bonâ fide* criticism upon a matter of public interest; the jury having found a verdict for the plaintiff, and assessed the damages at 100*l.*, the Court set aside the verdict and entered judgment for the defendant, on the ground that there was no evidence on which a rational verdict for the plaintiff could be founded (e).

Where the defendants, in a certain periodical work, published of the plaintiff, who was an exhibitor of flowers at a horticultural exhibition, the words following—"the name of Green is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes seem to have been broken in upon by some judges more honest than usual: if Green be the same man who wrote an impudent letter to the Metropolitan Society he is too worthless to notice: if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase." It was held, that such language and imputations were not within the limits of fair criticism (f).

Where the action was for an alleged libel, contained in a *critique* upon a picture of the plaintiff's, exhibited at Somerset House, describing it as a mere daub; Best, C.J., directed the jury to say, whether the publication was a fair and temperate criticism on the painting, or was made the vehicle of personal malignity towards the plaintiff. That if it was really an *honest* criticism, and no more, the defendant was entitled to the verdict (g).

In the case of *Soane v. Knight* (h), the plaintiff, an architect, complained of a libel published of him in his profession: the alleged libel professed to give an account of a new order of architecture, called the Bæotian Order, stating it to have been invented by the plaintiff, and illustrating the new order by examples of such buildings; all the buildings instanced being the works of the plaintiff. Lord Tenterden, in directing the jury said, "This publication professes in substance to be a criticism on the architectural work of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion; and however mistaken in point of taste that opinion may be, or however unfavourable to the

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Criticism on
exhibition of
Flowers:Libel on an
exhibitor.Criticism on
the works of
an Artist:
imputing that
his picture was
a "mere daub."Criticism on
works of
architecture.

(e) *McQuire v. Western Morning News Co.*, C.A. (1903), 2 K. B. 100.

(f) *Green v. Chapman and another*, 4 Bing. N. C. 92.

(g) *Thompson v. Shackell*, 1 M. & M. 187.

(h) 1 M. & M. 74.

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merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case, the censure is certainly strong, nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff."

Libel of an architect, imputing ignorance, want of experience, &c.

And where the plaintiff, an architect, employed in the restoration of an ancient church, complained of a letter published of him to a member of the committee, imputing that he had had no experience in the work he had been engaged to execute; such was held to be a libel upon him in his profession: and so also the statement that, by his execution of the work the masonry of an ancient gem of art would be ignorantly tampered with (i).

Tradesmen's Advertisements and Placards may be the subject of fair criticism.

Advertisements, hand-bills, and placards publicly put forth by tradesmen and others are open to fair criticism. And so where an alderman of the City of London, sitting in his magisterial capacity, called the attention of a newspaper reporter to a hand-bill by a marine-store dealer, which the alderman stigmatised as most pernicious in its effects, as offering great inducements to servants to rob their masters. The editor of the newspaper afterwards published the observations of the alderman, and wrote a criticism on the hand-bill, which he headed "encouraging servants to rob their masters." The article also contained other defamatory observations, and the jury having found a verdict for the defendant, the court refused to disturb it (k).

The circulation and position of a Newspaper are not matters of public interest.

The circulation and position of a newspaper are not matters of general public interest, such as to justify a discussion thereof in another newspaper (l). In the case of *Heriot v. Stuart (m)*, the defendant, who was printer of a newspaper called "The Oracle," published the following passages concerning "The True Briton" newspaper, of which the plaintiff was pro-

(i) *Botterill and another v. Whythead*, 41 L. T. 588.

(k) *Paris v. Levy*, 9 C. B. (N. S.) 342; 30 L. J. C. P. 11; and see *Jenner and another v. A'Beckett*, L. R. 7

Q. B. 11; 41 L. J. Q. B. 14.

(l) *Latimer v. Western Morning News Co.*, 25 L. T. (N. S.) 44, per Brett, J.

(m) 1 Esp. C. 437.

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prietor: "*Times v. True Briton*. In a morning paper of yesterday was given the following character of the 'True Briton':—that 'it was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain'; to the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and that it is the lowest now in circulation; and we submit the fact to the consideration of advertisers." It was ruled by Lord Kenyon, C.J., that no action was maintainable for the assertion that the other paper was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain. But that the subsequent words, alleging that it was the lowest paper in circulation, were actionable, since they affected the sale of the paper, and the profits to be made by advertising.

That Newspaper the lowest in circulation, actionable.

And so also an imputation in a rival newspaper, accusing the other of inserting spurious advertisements, is libellous (n). And where, in an action by the plaintiffs as co-proprietors of "The Army and Navy Gazette" against the publisher of "The Broad Arrow" for a libel, imputing to the former that they had, in their paper, a column for the advertisements of quack doctors and usurers; it was held defamatory of the proprietors, and actionable without proof of special damage (o).

That Newspaper inserts spurious and improper advertisements.

Publications in vindication of character publicly attacked or challenged; or in self-defence, when publicly charged; or by way of reply to personal imputations publicly made, are privileged if *bonâ fide*, and without malice; provided they be relevant to the matter of such vindication, and that the time and mode of publication are warranted by the occasion and circumstances. But publications in vindication of character are not always such as may be excused on the ground of public interest; the occasion may in some cases be such that the communication is privileged on the much narrower ground that the plaintiff himself having brought the matter before the public, by publishing it in a pamphlet or newspaper, the defendant, through the same channel, published the alleged libel in vindication of his character.

Publications in vindication of character.

The privilege in these cases must be used as a shield of defence, not as a weapon of attack. And where the plaintiff published a pamphlet as a means of making an appeal to public opinion, and was answered by a counter appeal in a pamphlet by the defendants; Cockburn, L.C.J., ruled,

Must be used as a shield of defence; not as a weapon of attack.

(n) *Latimer v. Western Morning News Co.*, *supra*.

(o) *Russell and another v. Webster*, 23 W. R. 59.

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that if the latter publication was *bonâ fide*, and for the purpose of vindication, and did not go beyond that object, it was privileged (*p*). And it has been held by the Court of Exchequer Chamber in Ireland, that, if a party choose to have recourse to a public newspaper, and publish statements reflecting on the conduct or character of another, the aggrieved party may have recourse to the public press for his defence and vindication; and if in so doing, he reflect on the conduct or character of his assailant, it will be for the jury to say whether he did so honestly in self-defence, or was actuated by malice towards the party who originally assailed him (*q*). And where the plaintiff, a barrister, in the course of a speech made by him in his capacity of an advocate instructed to oppose a bill before the House of Keys, promoted by the Government, vesting additional ecclesiastical patronage in the Bishop of Sodor and Man, wantonly impugned the conduct of the bishop, and attributed to him motives and conduct unworthy of his position; the bishop afterwards, in a charge to his clergy in convocation, commented severely on the speech and conduct of the plaintiff, and sent a copy of his charge to a local newspaper for publication. It was held, that the circumstances of the case warranted the bishop in sending his charge to the newspaper, and that such course being taken for the purpose of vindicating his character and conduct from the attack made upon it by the plaintiff, the occasion was privileged in the absence of express malice (*r*).

No privilege as to matters unconnected with vindication.

But although a party aggrieved by the publication of defamatory charges against him, may be privileged in publishing matter in vindication of his character; the privilege does not extend to the making of affirmative and independent charges unconnected with the matter of such vindication (*s*). The privilege extends only so far as to enable him to repel the charges brought against him,—not to bring fresh accusations against his adversary (*t*).

(*p*) *Kæmig v. Ritchie*, 3 F. & F. 413; *Reg. v. Veley*, 4 F. & F. 1117; and see *Hibbs v. Wilkinson*, 1 F. & F. 610.

(*q*) *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124.

(*r*) *Laughton v. The Bishop of Sodor and Man*, 9 Moo. P. C. C. (N. S.) 318;

L. R. 4 P. C. A.C. 495; 42 L. J. P. C. 11.

(*s*) Per Palles, C.B., in *Dwyer v. Eamonde*, Ir. L. R. 2 Q. B. D. 243.

(*t*) *Ibid.*, per May, C.J.; and see *Murphy v. Halpin*, Ir. R. 8 C. L. 127.

CHAPTER XI.

COMMUNICATIONS MADE IN THE DISCHARGE OF SOCIAL
AND OTHER DUTIES.

OCCASION : CONDITIONAL PRIVILEGE.

<i>Conditional privilege, depending on occasion and circumstances.</i>	<i>Characters of servants.</i>
<i>General principles and grounds of privilege.</i>	<i>Voluntary communications in discharge of social and other duties.</i>
<i>Classification and arrangement.</i>	<i>Communications made in exaggerated language, or in excess of the occasion.</i>
<i>Communications in reply to confidential and bonâ fide inquiries.</i>	<i>Where the mode or extent of publication is in excess of the occasion.</i>

IN this chapter are comprised communications made in the discharge of social and other duties, private, or official ; to which the occasion and circumstances under which they are made, supply a *conditional* defence, dependent on the absence of actual malice in the party making the communication or causing it to be made. CHAPTER XI.
Conditional privilege.

In communications of the class here indicated, it is obvious that the general public have no corresponding interest ; consequently such communications will not admit of general publicity.

The question, then, arises,—When do the occasion and circumstances of the communication afford a conditional defence dependent on the absence of express malice ? In other words, when is express malice (or malice in fact) essential to the right of action ? The principle which governs this class of cases, where the existence of express malice is a test of civil responsibility, comprehends all those where the author of the alleged mischief acted in the discharge of some social or moral duty, public or private, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform ; but where the occasion does not furnish an absolute defence, independently of the question of malice. Occasion and circumstances.

The general principles upon which communications of the class here indicated are privileged are, that communications General principles and

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grounds of
privilege.

which the ordinary exigencies of business, or of society, require to be made, may be protected (notwithstanding that they be defamatory of individuals) when communicated to persons entitled to the information, by persons acting honestly and without actual malice: as, on the one hand, it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation; so, on the other, would it be highly mischievous to allow men to inflict the most cruel injuries to reputation, character or credit, with impunity, under the cloak and pretence of discharging some duty to society, or to themselves or others, when they were in fact actuated by the most malicious motives. The law therefore, in such instances and, as it seems most wisely, makes the issue to depend on the existence or the absence of express malice: and thus an ample shield of protection is extended to all who act fairly and prudently; in order that men may not be deterred by the fear of an action or prosecution, from making communications in protection of their own interests, or in the discharge of their duties to others.

Conditions of
the privilege.

And therefore, in these cases, the occasion and circumstances of the communication supply a *conditional* defence, dependent on the absence of express malice and the manner and extent of publication. If the communication be made maliciously, the occasion affords no privilege. And if it be made more injuriously than necessary, *i.e.*, in exaggerated language, or in any other manner such as is found by a jury to be in excess of the occasion, it is to that extent actionable. The manner of publication may, indeed, be such as to entirely deprive the communication of the privilege which the occasion would otherwise have extended to it. And accordingly, whenever it is found by the jury that the mode of communication resorted to by the defendant was not warranted by the occasion, the communication is thereby deprived of the privilege which, *primâ facie*, attached to it. An aggravating mode of publication, or a publication to more persons than necessary, may in some cases show conclusively the malice of the defendant. So also if the communication be made with a *knowledge* that it is untrue; for there can be no interest or duty such as will protect the publication of defamatory matter known by the person publishing it to be false.

Classification

The extensive class of communications, the subject of the

present chapter, may, not inconveniently, be classed under two heads (viz.):—

CHAPTER XI.
and arrange-
ment.

1. Those that are fairly and honestly made *in reply to confidential or bonâ fide inquiries*, upon matters in which the parties making the inquiries have a legitimate interest; such as an inquiry into the character of a servant about to be hired, the solvency of a trader about to be trusted, the skill or ability of a professional practitioner about to be employed, the trustworthiness of a person about to be taken into a confidential situation, and such like.

2. *Voluntary communications*, or such as are made without any inquiry, but in the discharge of some *duty* (public (a) or private) which the ordinary exigencies of society, the interest of the party making the communication, or the interest of the party to whom it is made, or even that of another, called upon him to perform.

Although the principles of law applicable to each of the two classes above specified are the same, there is an obvious distinction between communications made in reply to legitimate and *bonâ fide* inquiries, and those that are volunteered without any inquiry. In the one case the communication is privileged by reason of the *interest* which the inquirer has in the subject-matter of the communication: in the other the privilege must rest on some *duty* which the law recognises as affording a legal excuse for making the communication. And therefore, where the communication is made by a person who has no interest (except that of a mere busybody) in the subject-matter of the communication, nor any duty such as would justify him in making it, the communication will not be privileged (b). And where a master volunteers, without any inquiry, to give a character of a discharged servant, stronger evidence of *bonâ fides* will be required than if he had given the character after being asked to do so (c). And if a defendant voluntarily, and without being asked in any way to do so, make a defamatory communication reflecting on the character of the plaintiff as a tradesman, he is liable to an action for the defamation (d).

Distinction
between com-
munications
in reply to
inquiries,
and those
volunteered.

It is not because a voluntary communication is made "confidentially," nor because it is marked "private," that it is

(a) The term "public duty" as used here, is not meant to include communications made in the course of judicial and parliamentary proceedings, in which the privilege is *absolute*. *Vide supra*, Caps. VII. and VIII.

(b) *Botterill and another v. Whythead*, 41 L. T. 588.

(c) *Pattison v. Jones*, 8 B. & C. 578.

(d) *King v. Watts*, 8 C. & P. 615, per Lord Abinger, C.B.

CHAPTER XI. necessarily privileged; the question is; was there any *duty* (legal, social, or moral) which the party volunteering the communication was called on to perform?

Class 1.—And first as to defamatory communications that are fairly and honestly made in reply to confidential, or *bonâ fide*, inquiries, upon matters in which the parties making the inquiries have a legitimate interest.

Communica-
tions in reply
to confidential
and *bonâ fide*
inquiries.

The general rule with regard to such communications is, that for words spoken, or communications written, upon advice *bonâ fide* asked, or in reply to inquiries *bonâ fide* made, no action lies; unless such words or communications be uttered or made of express malice: or in other words, the occasion for the communication affords a defence in the absence of express malice.

Where a party asks advice or information upon a subject-matter in which he is legitimately interested; or where the relative positions of two parties are such that the one has a right to expect, in reply to his inquiry, confidential information and advice from the other; there is a moral duty to answer such inquiry and give such information and advice; and the statements so made in reply may be rendered lawful by the occasion, although defamatory of some third person (*e*).

Characters of
servants.

Among the most prominent of the decisions comprehended within the present class, are those which have arisen from actions brought by servants against masters. The giving a character of a servant is one of the most ordinary communications which a member of society is called on to make; but it is of great importance to the well-being of society that it should be made fairly, conscientiously and truthfully: and a party offends grievously against society if he give a good character where it is not merited; and against justice and humanity in designedly giving a bad one where it is not deserved, or in refusing, unreasonably, to give one at all.

No legal
obligation upon
master to give
any character
at all.

But there is no legal obligation upon a master to give any character at all to a servant on leaving, or on dismissal; and no action will lie against him for refusing to do so. Where, therefore, an action was brought against a master for refusing to give a servant "such a character as she deserved, or any character whatever"; whereby another employer, who was otherwise ready and willing to have taken her into her service, refused to do so. Upon the pleadings being opened, Lord

(*e*) *Coxhead v. Richards*, 2 C. B. 606, see per Cresswell, J.

Kenyon, C.J., said such an action could not be supported at law. That in the case of domestic and menial servants, there was no obligation upon a master to give the servant a character : it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it (*f*). And where a master having dismissed his servant for dishonesty, refused to give him a character ; alleging to those who applied, that he had dismissed him from his service for dishonesty. The servant's brother afterwards inquired of the master why he had so treated the servant, and was thus keeping him out of a situation ? The master replied, " He has robbed me ; and I believe for years past." Only one instance of actual robbing had been previously imputed, and one only was proved ; but it was held, nevertheless, that the answer to the brother did not go beyond the privilege afforded by the inquiry (*g*).

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With regard to the characters of servants, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that it may be well deemed the *moral duty* of former employers to answer inquiries to the best of their belief (*h*). But it would appear from the judgment of Bayley, J., in a leading case on the subject, that it is necessary that inquiry should be made, in order to render lawful the communication of defamatory matter ; although that learned judge intimated that such inquiry might be invited by the former master (*i*).

In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man upon the subject of character should be privileged, if *bonâ fide* and without malice. And this privilege is founded on the interest of the inquirer in ascertaining the character of the servant he contemplates hiring, and the moral duty of the servant's former employer in communicating facts within his knowledge, to such inquirer. If, however, the party giving the character knowingly makes statements that are untrue, such will be evidence of malice, and will deprive him of the protection which the law otherwise throws around such communications.

General rule on giving character of servant.

Where a master gives a character of a servant, unless the

(*f*) *Carrol v. Bird*, 3 Esp. 201.

(*h*) See per Cresswell, J., in *Cor-*

(*g*) *Taylor v. Hawkins*, 16 Q. B. 322.

head v. Richards, 2 C. B. 605.

(*i*) *Pattison v. Jones*, *infra*.

CHAPTER XI. — contrary be expressly proved, it will be presumed that the character was given without malice (*k*): and although the statement as to character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and *knowingly* stated what was untrue and injurious to the character of the servant (*l*).

Where the plaintiff, who had been employed by the defendant as governess, and was afterwards dismissed; lost another engagement because the defendant in reply to inquiries respecting her competency, wrote—"I parted with her on account of her incompetency, and not being lady-like nor good-tempered;" and added by way of postscript, "May I trouble you to tell her, that this being the third time I have been referred to, I beg to decline any more applications." General evidence was given of the plaintiff's competency, lady-like manners and good temper, and that in reply to the two previous applications, which were made before her dismissal, the defendant had recommended her. Lord Denman, C.J., refused to nonsuit the plaintiff, and directed the jury, that a party in responding to such an inquiry is bound to speak the truth, but is not to be challenged to prove the truth of the statement, unless there is direct evidence that the communication was influenced by some malicious feeling; that if a *prima facie* case of falsehood be made out, the defendant is then called upon to show that the assertions were made under a belief in their truth: and that the question for the jury was, whether, looking at the whole case, there was sufficient proof that the defendant, in writing the letter, had been influenced by some improper feeling towards the plaintiff to make a false statement knowingly; and this was held to be a right direction to the jury (*m*).

Affirmative evidence of malice necessary in these cases.

Where the defendant, on application for a character, stated in a written answer, that the plaintiff had, whilst in her service, conducted herself disgracefully, and that she had since been a prostitute: and a similar statement had been made by the defendant to persons who had recommended the plaintiff to her; it was held, that they were *prima facie* privileged communications; and that the plaintiff was properly nonsuited for want of proof of malice (*n*). Slight evidence is however suffi-

(*k*) Burr. 2425; *Edmonson v. Q. B.* 11.
Stephenson, B. N. P. 8.

(*m*) *Fountain v. Boodle*, 3 Q. B. 5.

(*l*) *Fountain v. Boodle and ux.*, 3

(*n*) *Child v. Affleck*, 9 B. & C. 403.

cient in these cases to warrant the jury in finding malice (o). But a plaintiff does not sustain the burthen of proof which is cast upon him, by merely giving evidence which is equally consistent with either view of the matter in issue. Where the presumption of malice is neutralised by the circumstances attending the utterance of the slander or the publication of the libel, the plaintiff must give affirmative evidence of malice in order to maintain his action.

Where the defendant in answer to an inquiry as to the character of the plaintiff, who had been in his service, stated that she was dishonest ; whereby the plaintiff lost another engagement ; it appeared from the evidence that the charge of stealing was not made until after the plaintiff had left defendant's service ; and he told her he would say nothing about it if she would resume her employment at his house ; and he on a subsequent occasion said, that if she would acknowledge the theft he would give her a character : it was held, that the jury were well warranted in coming to the conclusion that the defendant was *not* acting *bonâ fide* in the statement he made when asked as to the plaintiff's character (p). Absence of *bonâ fides*.

The privilege which protects a master in giving a character to a servant extends over facts afterwards discovered, though at the time of giving the character unknown to the master (q). And if a master having given a servant a good character, soon afterwards discovers that the servant was dishonest, it becomes his duty to communicate his discovery to the person who applied to him for the servant's character ; and the subsequent statement is as much protected as the former. But it seems to have been laid down generally by Lord Mansfield (r), that where a master, *unasked*, gives a bad character of a servant, he must justify as in other cases. And there can be no doubt that the manifestation of forward and officious zeal on the part of a defendant, who, *uninvited*, gives a character to the prejudice of his former servant, would be a material guide to a jury in ascertaining his real motive. Facts afterwards discovered and communicated are privileged.

So in a case where a master wrote a first letter without a previous application having been made for a character of the servant, but wrote a second in answer to inquiries made of Characters given when not asked for

(o) *Kelly v. Partington*, 2 Nev. & Man. 460 ; 4 B. & Adol. 700.

(p) *Jackson v. Hopperton*, 16 C. B. (N. S.) 829.

(q) *Gardner v. Slade*, 13 Q. B. 799 ; 18 L. J. Q. B. 334.

(r) *Lowry v. Aikenhead*, Mich. 8 G. 3.

CHAPTER XI. him as to the plaintiff's character ; Lord Tenterden, C.J., left it to the jury to say, whether the communication contained in the second letter was made *bonâ fide*, acting under a belief that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously, with an intention of doing an injury to the plaintiff ; and the jury having found that the communication was maliciously made, the court refused to disturb the verdict (s).

Complaint to
Servant's
former
employer.

Where the defendant had written a letter to the person who recommended the plaintiff to his service, informing him that the plaintiff had not justified the character given with him, and cautioning the person against giving him a recommendation for morality or honesty : it was ruled by Watson, B., that in the absence of malice (which was a question for the jury) the letter was a privileged communication (t). In a subsequent case, which was an action brought by a gardener against a master, from whose service he had been discharged for misconduct ; the action was for an alleged libel contained in a letter written voluntarily, to the former party who had previously recommended the plaintiff to the defendant, and who was about to employ him again, and would have done so but for the unasked communication of the defendant ; the jury negatived malice, but the court expressed very grave doubts as to whether the communication could be treated as privileged, even if it had been confined to a simple statement of the plaintiff's conduct ; but as it contained expressions beyond what could be justified it was, clearly, not a privileged communication (u).

Good character
given, may be
retracted.

If a lady having given her servant a good character, afterwards discover facts which would not have justified her in so doing ; and then induce the employer to whom the character was sent, to make farther inquiries about the servant's character ; such is a privileged communication, and is not in itself evidence of malice (x).

In the case of a master giving the character of a discharged servant, it is not essential to the protection of such a communication that no one should be present but the person interested in the inquiry. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very

Communica-
tions as to
characters of
Servants made
in presence of
third parties.

- (s) *Pattison v. Jones*, 8 B. & C. 578. (N. S.) 429 ; 33 L. J. C. P. 96.
(t) *Dixon v. Parsons*, 1 F. & F. 24. (x) *Gardner v. Slade*, 13 Q. B. 796 ;
(u) *Fryer v. Kinnersley*, 15 C. B. 18 L. J. Q. B. 334.

liberally construed) (y), it is privileged. The simple circumstance of the master exercising the privilege in the presence of a third party does not of necessity take away from the communication the protection which the law affords. But where an opportunity is sought for making a charge before third persons, when it might have been made in private, such affords strong evidence of a malicious intention; and thus deprives the communication of that immunity which the law would otherwise allow to it: but the mere fact of a third person being present does not render the communication absolutely unauthorised, though it may be a circumstance to be left with others,—including the style and character of the language used,—to the consideration of the jury; who are to determine whether the defendant has acted *bonâ fide* in making the charge, or has been influenced by malicious motives (z). And so if a master about to dismiss a servant for dishonesty, call in a friend to hear what passes, the presence of such third person does not take away the legal privilege of the words imputing such dishonesty (a). And where the defendant, having dismissed the plaintiff from his service, afterwards called in two other of his servants and said in their presence, “I discharged that man for robbing me. He is a thief; and if ever you speak to him again, or have anything to do with him, I shall consider you as bad as him, and shall discharge you.” This was held to be a privileged communication; and that, in the absence of direct evidence of malice, the judge was right in declining to submit the case to the jury (b). And so also where the defendant having given notice of dismissal to two of his servants, they went separately and inquired the cause of their dismissal; when the defendant told each, in the absence of the other, that they were discharged because they had both been robbing him; it was held, that they were privileged communications, not only as affecting the servant to whom the words were addressed, but also as affecting the absentee (c).

And where a Railway Company, having dismissed the plaintiff, one of their servants, for neglect of duty, published his name and a notification of his dismissal, with the cause

(y) See *Child v. Affleck*, 9 B. & C. 403.

(b) *Somerville v. Hawkins*, 10 C. B. 583; 20 L. J. C. P. 131.

(z) See *Toogood v. Spyring*, 1 C. M. & R. 194.

(c) *Manby v. Witt*, and *Eastmead v. Witt*, 18 C. B. 544; 25 L. J. C. P.

(a) *Taylor v. Hawkins*, 16 Q. B. 322.

CHAPTER XI. thereof in their monthly circular : which was exhibited in the rooms allotted to their staff throughout their system : in an action of libel against the Company for damages for such publication ; it was held, that the occasion of the publication was privileged (*d*).

Defamatory statements made at the request, or by the invitation, of the plaintiff.

Where the publication of the defamatory matter was procured by the contrivance of the plaintiff, with a view to the foundation of an action against the defendant ; the communication may be privileged on the ground that the plaintiff himself was the voluntary author of the mischief complained of (*e*). And so where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover (*f*).

Official of two companies.

And where the defendant was a director of two companies, and the plaintiff held office under both, the plaintiff was dismissed from one office for gross misconduct : the defendant afterwards communicated the fact of such dismissal to his co-directors of the other company ; and in reply to inquiries stated, that one of the causes of his dismissal was obtaining money by false pretences ; it was held a privileged communication, and that in the absence of direct proof of malice, the case should not have been submitted to the jury (*g*).

Inquiry by person in treaty for purchase of House.

As to communications in reply to inquiries other than those as to the characters of servants, the cases are numerous, and present a variety of circumstances ; but the principles governing such communications are the same. So it has been ruled that the owner of a public-house could not maintain an action against a neighbouring publican, for giving a bad character of such house to a person who, being in treaty for purchasing it, applied to the defendant for information ; provided there was some evidence, though slight, of the truth of the assertion (*h*).

Reply to inquiry as to solvency.

Where in reply to an inquiry by the plaintiff as to the solvency of a tradesman, the defendant makes defamatory observations, to the effect that the tradesman is not to be trusted : if such observations are made *bonâ fide* and without malice, they are not actionable (*i*).

(*d*) *Hunt v. G. N. Ry.*, 60 L. J. Q. B. 499 ; (1891), 2 Q. B. 189.

(*e*) *Weatherston v. Hawkins*, 1 T. R. 110 ; *Smith v. Wood*, 3 Camp. 323 ; *Warr v. Jolly*, 6 C. & P. 497.

(*f*) Per Lord Alvanley, C.J., 3 B. & P. 592 ; *King v. Waring*, 5 Esp. 14.

(*g*) *Harris v. Thompson*, 13 C. B. 333.

(*h*) *Humber v. Ainge*, per Abbott. L.C.J., West. 13 Feb. 1819.

(*i*) *King v. Watts*, 8 C. & P. 615, per Lord Abinger, C.B.

Where it was alleged that the plaintiff had been engaged as probatory minister at a certain church or chapel, in order that if approved he should be appointed permanent minister ; and the defendant in a discourse with one G. B., imputed drunkenness to the plaintiff ; whereby the congregation refused to appoint him permanent minister. It was ruled, that the occasion was privileged, unless the words were not spoken *bonâ fide*, and unless the defendant was actuated by malice, and the latter issue was for the plaintiff to establish (*j*).

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Reply to inquiries as to fitness of person seeking office of a minister.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not merely, on account of those circumstances, a privileged communication (*k*). But where the defendant, the secretary to a charity organisation society, having for one of its objects the repression of mendicity, instituted, at the request of the society, inquiries as to the *bonâ fides* of certain statements contained in letters written by the plaintiff to the subscribers, and others, soliciting pecuniary and charitable relief: the result of such inquiries were embodied by the defendant in a report containing defamatory imputations upon the plaintiff, to the effect that she was a confirmed begging-letter writer, that her letters contained misrepresentations, exaggerations, and untruths ; and stating, that the society did not recommend assistance to be given to her. In an action by the plaintiff for libel in publishing the report ; it appeared that the report was issued to anyone who applied for it or who professed to be interested in the matter : and it was held, that the inquiries and the result thereof having been *bonâ fide* made and embodied in a report by the defendant and published to inquirers in the discharge of his duty as secretary to the society, and without malice, were privileged (*l*).

Communications in reply to inquiries by subscribers to Charity Societies.

Charity Society, defamatory Report issued to inquirers, by Secretary.

A person who is the author of a slander aggravates the wrong by every reassertion or repetition of it. Where therefore a slanderous report originates with the defendant, and thereby produces an inquiry by or on behalf of the person slandered, the repetition of the report, on such inquiry, is not privileged (*m*). But where the plaintiff invited the alleged slander of himself by questions to the defendant, the com-

Re-assertion or repetition of slander, in reply to inquirer.

(*j*) *Warr v. Jolly*, 6 C. & P. 497, 51 L. J. 274.

per Alderson, B.

(*m*) *Smith v. Matthews*, 1 Moo. &

(*k*) *Martin v. Strong*, 5 A. & E. 535. Rob. 152.

(*l*) *Waller v. Lock*, 7 Q. B. D. 619 ;

CHAPTER XI. **Acknowledgment of previous statement imputing felony.** munication in reply was ruled to be privileged (*n*). If the defendant merely acknowledge a previous statement made by him, such acknowledgment alone will not sustain an action; though it may be used as evidence of such former statement (*o*). But where A. having accused B. of stealing meat from his shop; a friend of B.'s to whom B. had mentioned the charge, called at A.'s shop, and inquired if he had accused B. of stealing a piece of meat; to which A. replied, "Yes, and I believe it to be true." It was held *not* a privileged communication (*p*).

Inquiries made at instigation of plaintiff himself. Where the libel complained of arose out of a certain correspondence that was entered upon at the instigation of the plaintiff himself, with a view to the investigation of the truth of certain imputations that had been made upon him, it was held to be a privileged communication (*q*).

Subsequent statements in relation to confidential inquiry. When a confidential relation is established between two persons, with regard to an inquiry of a private nature, whatever takes place between them, relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them; and therefore entitled to the same protection (*r*).

Defamatory charge made under mistake, in reply to inquiries. Where the defendant was surveyor to the owner of an estate, to which estate he also acted as steward. The owner having directed him to make inquiries as to the alleged existence of a house of ill-fame on the estate; the defendant, in the course of his inquiries, was referred to the house of the plaintiff as the house in question; but, doubting the accuracy of his information, made further inquiries, and in so doing repeated the previous information he had received as to the plaintiff's house. The defendant subsequently ascertained that a

(*n*) *Palmer v. Hummerston*, 1 Cab. & El. 36, per Day, J.

(*o*) *Kine v. Sewell*, 3 M. & W. 297.

(*p*) *Force v. Warren*, 15 C. B. (N. S.) 806; and see *Richards v. Richards*, 2 Moo. & Rob. 559.

(*q*) *Hopwood v. Thorn*, 8 C. B. 293; 19 L. J. C. P. 94.

(*r*) *Beatson v. Skene*, 5 H. & N. 838; 29 L. J. Ex. 430. And see *Davis v.*

Reeves, 5 Ir. C. L. R. 79, where it was held that a person's general attorney, though not then employed in any legal proceedings for him, is one from whom a party is entitled to expect all information material to his interest; and a communication by him, to such client, though defamatory of third parties, is a privileged communication, if made *bonâ fide*.

mistake had been made with reference to the plaintiff's house: it was held that in the absence of any evidence of express malice the occasion was privileged (s). CHAPTER XI.

Although a letter containing defamatory matter be marked "private and confidential," it may nevertheless be libellous. Confidential communications.

Where a letter is written upon information given "confidentially"; if it contains matter defamatory of a third person, the fact that it is marked "confidential" will be no protection to the writer.

Where W. went to inquire of defendant for the plaintiff's address; the plaintiff having previously been tenant to the defendant. In the course of the inquiry, defendant spoke disparagingly of the plaintiff, when W. told him he did not come to inquire into his character, as he had done business with him before, but merely came to ask where he had removed to: the defendant however notwithstanding the observation of W., continued to speak disparagingly of the plaintiff, and imputed in certain words that he was a swindler, adding at the same time that *he spoke in confidence*. In consequence of the communication, W. declined to trust the plaintiff with goods: and it was held to be no misdirection to have left it to the jury to say whether or not they believed it was a *bonâ fide* confidential communication made by the defendant for the purpose of putting people on their guard against the plaintiff (t). Question for jury as to *bonâ fides* of confidential communication or inquiry.

And where the plaintiff, a trustee of a charity, asked his employer, C., to obtain signatures to a protest against his being turned out of the trusteeship. C. applied to the defendant for his signature, which the defendant refused; and on being pressed to give his reasons said, that he would never sign to keep a big rogue like the plaintiff in the trust; and explained as the reason for his opinion, that the plaintiff had left the parish under discreditable circumstances and without settling with his creditors, of whom the defendant was one; and added, that he was surprised that C. kept such a man on with his son. In consequence of these statements, C. dismissed the plaintiff from his employment as a farm bailiff; which was the special damage alleged. The jury found that the defendant acted without malice; and it was held, that assuming the words to have been *bonâ fide* spoken, with reference to the propriety of taking steps to retain the plaintiff in the trusteeship, as they were pertinent to the question whether he was fit to be trusted or not, they were to be regarded as Communication as to fitness of person for trusteeship:

(s) *Brett v. Watson*, 20 W. R. 723. (t) *Picton v. Jackman*, 4 C. & P. 257.

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as to fitness
for office of
arbitrator.

privileged by the occasion (u). And where the plaintiff had been proposed as arbitrator in a matter between the defendant and another person, the defendant refused to submit the matter to the plaintiff; and being afterwards applied to for payment of part of the remuneration for the attendance of the plaintiff as arbitrator, wrote a letter in reply, in which he repudiated the demand, and stated as his reason for not submitting the matter to the plaintiff as arbitrator that he, the defendant, had discharged the plaintiff from his employment for intemperance. It was held, that in the absence of malice the communication was privileged (x).

Voluntary
communica-
tions in dis-
charge of
social and
other duties.

Class 2.—And *secondly*, as to *Voluntary Communications*, or such as are made without any inquiry, but in the discharge of some duty (public or private) which the ordinary exigencies of society, the interest of the party making the communication, or the interest of the party to whom it is made, or even that of another, called upon him to perform.

Rule of law
as to.

The rule of law as to cases falling under this head, is thus stated in a leading case on the subject:—"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publications malicious, unless fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a conditional defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (y). And so also, according to another well recognised legal canon—a communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding interest or duty; although it contain defamatory matter, which without that

(u) *Cowles v. Potts*, 34 L. J. Q. B. D. 496.
247.

(y) *Too good v. Spyring*, 1 C. M. &

(x) *Hobbs v. Bryers*, Ir. L. R. 2 Ex. R. 193.

privilege would be actionable. And this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation (z). CHAPTER XI.

One of the earliest instances on record in which the principles above stated were recognised is to be found in a case in the Star Chamber (a), where a libel was written under the following circumstances:—The plaintiff was heir-at-law to one Richard Peacock, then of the age of 86 years, and the owner of lands of inheritance of the value of £800 a year; the defendant, who had married the daughter of a younger brother of Richard Peacock, wrote a letter to the latter, stating that the plaintiff was not his legitimate son, that he was a man of dissolute conduct, and desired to hear of the death of the said Richard; that all the inheritance would not be sufficient to pay the plaintiff's debts; with other statements defamatory of the reputation and credit of the plaintiff; the letter was held to be a libel; and the Court observed, that had it been a letter sent to a father for the purpose of the reformation of a child, and not for defamation, it would not have been a libel: that if a letter containing scandalous matter be sent to a third person, if it be reformatory, and not for any sinister purpose, it would not be libellous; for the mind with which the communication was made is to be respected; as if one wrote to a father scandalous matter concerning his children for the purpose of giving notice thereof to the father, and advising him to have better regard to them, such is only reformatory and not actionable; but in the present case the defendant intended his own benefit and profit, and such was the distinction (b).

Upon similar principles, it is well established that, communications made to proper authorities, by persons whose duty calls upon them to make such, as to the misconduct of persons in the public or other service or employ, or for the purpose of preventing or punishing abuses of office, or for the redress of wrongs and injuries in relation thereto, are privileged, in the absence of express malice. And accordingly, a communication made by the sergeant of a volunteer corps to the proper officers of the corps respecting the disaffection and improper conduct of one of its members, is a privileged communication (c). So also a letter written by a private

(z) *Harrison v. Bush*, 5 E. & B. Brownl. & Golds. 151.

344; *Whiteley v. Adams*, 15 C. B. (b) 2 Brownl. & Golds. 152.

N. S. 392. (c) *Barbaud v. Hookham*, 5 Esp.

(a) *Peacock v. Sir Geo. Reynell*, 2 109, per Lord Ellenborough, C.J.

CHAPTER XI.

In discharge of
official duties.

individual to a public officer complaining of the misconduct of a person under him, if made *bonâ fide*, and without malice, though some of the charges contained in it may not be true (d). And a letter written by a commanding officer and member of the Executive Government of St. Helena, to the Colonial Secretary of that island, imputing that the assistant-master of the Government-school at that island was drunk and disorderly at a certain time and place, was held a privileged communication (e). And where defamatory representations were made to the Foreign Board at Peking by the defendant in the course of his duty as an officer of the Chinese Government, complaining of the conduct of the plaintiff as a professor in the college at Peking, whereby the plaintiff was dismissed by the board. It was held, that the communication was *prima facie* privileged, and that the judge ought to have explained to the jury the relation and position of the parties, and have told them that the action would not lie if the communication was made honestly in the belief of its truth, and without express malice; and that the burden was on the plaintiff to prove it was not so made; also that it was a misdirection to direct them to consider whether the communication was warranted by facts (f).

No privilege
when not made
in discharge
of duty.

But a communication made by one officer of a regiment to another, defamatory of a third officer in the same regiment, is not privileged on the ground of interest, or otherwise, when not made in the discharge of duty, either military or social (g).

Communica-
tion made to
an M.P., as to
a question to
be put to the
House of
Commons.

A communication made to a Member of Parliament as to a question to be put to the House of Commons relative to the dismissal of a colonel in command, on charges contained in letters from a commanding officer of a regiment to his immediate superior, was ruled by Lord Campbell, C.J., to be a communication made on a privileged occasion; but circumstances showing that the object of the communication was to prejudice the plaintiff by reason of a personal resentment, on account of other matters, were evidence of actual malice, on proof of which the communication would be deprived of its privilege (h). And it was also ruled in the same case, that letters from the commanding officer of a regiment to his immediate superior,

(d) *Blake v. Pilfold*, 1 Moo. & Rob. 198, per Taunton, J.

(e) *Stace v. Griffith*, 6 Moo. P. C. C. (N. S.) 18; L. R. 2 P. C. A. C. 420.

(f) *Hart v. Gumpack*, 9 Moo. P. C. C. (N. S.) 241; L. R. 4 P. C. 439; 42

L. J. P. C. 25.

(g) *Bell v. Parke*, 10 Ir. C. L. R. 279; *ibid.* 11 Ir. C. L. R. 422 (Figgott, C.B., *dubitante*).

(h) *Dickson v. The Earl of Wilton*, 1 F. & F. 419.

containing charges against the colonel in command, were privileged; but that circumstances showing that the letters were not written from a sense of duty, but from personal resentment, on account of other matters, would be evidence for the jury of actual malice, on proof of which the privilege would be taken away (i). CHAPTER XI.

And so, although it may be the duty of all persons to give information to His Majesty's proper officers concerning abuses of office, yet the falsehood or absence of all ground for a communication of the kind, is sufficient proof of malice, where no excuse is offered in evidence on the part of the defendant (k). Absence of all ground for the communication is proof of malice.

And if the plaintiff give evidence from which the jury may infer malice; for instance, by showing that the defendant cast imputations which he did not *believe* to be true, or acted from sinister or corrupt motives, and not with the *bonâ fide* intention of discharging a duty social or moral; the plaintiff may sustain the action notwithstanding that the words were spoken upon an occasion which *primâ facie* justified them (l). Privilege lost on proof of bad motives.

And where the defendant addressed a letter to the Poor Law Commissioners, stating that the plaintiff had been a guardian of the poor during the previous year, and was a *great defaulter* in his accounts, and did not pay the balance due from him till an execution to levy it was issued. It appeared that the defendant was an auctioneer, and he had sent this letter in consequence of a resolution of the guardians to employ the plaintiff in some business for which the defendant also was a candidate. The jury having found a verdict for the plaintiff; on motion to set it aside, Patteson, J., said, in the course of his judgment, "If a *bonâ fide* communication be made to the Poor Law Commissioners respecting the conduct of a guardian, they having the general control of the guardians, I do not say that such a communication would not be privileged; but as the letter read to-day it is impossible to say that it was a *bonâ fide* communication, made for the purpose of giving information to the Poor Law Commissioners:" and per Coleridge, J., to the same effect (m). Libel of a Guardian of the poor, sent to Poor Law Commissioners.

Where the plaintiff was an inspector appointed, under the Contagious Diseases (Animals) Act, 1878, by the local authorities, but removable by the Privy Council, for misconduct: Letter to Privy Council, charging Public Officer with misconduct.

(i) *Dickson v. The Earl of Wilton*, per Lord Campbell, C.J.; but see *Dawkins v. Rokeby*, L. R. 8 Q. B. 272; 42 L. J. Q. B. 74.

(k) *Robinson v. May*, 2 Smith, 3.

(l) *Jackson v. Hopperton*, 16 C. B. (N. S.) 837; and see *Cooke and another v. Wildes*, *infra*, p. 194.

(m) *Warman v. Hine*, 1 Jur. 820.

CHAPTER XI. the defendant wrote a letter to the Privy Council, accusing the plaintiff of dereliction of duty, and of having received a bribe. In an action, charging as libellous the defendant's letter to the Privy Council, the defendant pleaded that the occasion was *absolutely* privileged: it was held, that the occasion did not confer such absolute privilege, and that on proof of express malice, the action was maintainable (*n*).

Communi-
cation to
justices at
special Ses-
sions, defama-
tory of parish
officer elect.

The plaintiff's name having been inserted by a parish vestry in a list of persons qualified and liable to serve as parish constables, he attended a special session of the magistrates, to be sworn in; when the defendant, a parishioner, objected to him, and made a statement in the presence of several persons, imputing perjury to the plaintiff. In an action for the slander, the jury found that the defendant made the statement *bonâ fide*, believing it to be true; and it was held, that the statement was properly made to the justices at the special session, and was a privileged communication (*o*).

Communica-
tions to parish
meetings
reflecting on
parish officers.

Where a ratepayer being unable to attend a parish meeting assembled for the purpose of investigating the accounts of one of the parish constables, wrote a letter to the meeting containing imputations of misappropriation of money by the constable: it was ruled by Parke, B., that the communication was *primâ facie* privileged; and that in the absence of direct evidence of malice, it rested with the plaintiff to prove that the defendant's absence from the meeting was wilful (*p*).

To charitable
institution
defamatory of
Secretary.

And a letter written by a subscriber to a charitable institution to the committee, impugning the moral conduct of the secretary; particularly with reference to a young woman the defendant had recommended as matron; is a privileged communication, if made in the honest and reasonable belief that the charges were true, although founded on hearsay (*q*).

Letter to
Bishop im-
puting mis-
conduct to
Incumbent.

A letter written to a bishop informing him of a report current in a parish in his diocese, that the incumbent of a district in that parish had been guilty of disgraceful conduct; is a privileged communication, if made honestly, for the purpose of calling the attention of the bishop to a rumour which was bringing scandal on the Church; and not from any malicious motive; and it is not material that the writer of the letter did

(*n*) *Proctor v. Webster*, 12 Q. B. D. 112; 55 L. J. 150.

(*o*) *Kershaw v. Bailey*, 1 Ex. 743; 17 L. J. Ex. 129.

(*p*) *Spencer v. Hamerton*, 1 Moo. & Rob. 470; and see *George v. Goddard*,

2 F. & F. 689, per Cockburn, L.C.J.

(*q*) *Maitland v. Bramwell*, 2 F. & P. 623, per Byles, J.; and see *Hartwell v. Vesey and ux.*, 3 L. T. (N. S.) 275.

not live within the same district as the incumbent complained of (r). CHAPTER XI.

Where an application is made for the purpose of obtaining redress, though it be to a party who has no direct means of giving relief, yet, if the applicant may possibly obtain such relief indirectly and he act *bonâ fide*, it seems that he is not liable to an action (s). A petition addressed by a creditor of an officer in the army, to the secretary at war, and complaining of unjust and unfair conduct in respect of a debt due to him from the plaintiff, and written for the purpose of procuring payment of the debt through the interference of the secretary ; was held not a libel ; the petition containing no more than a fair and honest statement of facts, in the apprehension of the defendant (t). And Best, J., observed,—the circumstances under which this petition was sent rendered it a privileged communication. It was an application for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress : and this may be done without hazard of an action or prosecution, if the application be made *bonâ fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse (u). But an officer in the navy has no right to complain, by letter to Lloyd's, of the conduct of the captain of a transport-ship : such a communication, in order to be privileged, should be addressed to the proper Government authorities (x).

Communications made to the wrong authorities, or those having no power to give redress.

Where the plaintiff was town clerk and clerk to the justices of a borough, and the libel complained of was contained in a letter to the Secretary of State, written by the defendant, who was an inhabitant of the borough, imputing to the plaintiff corruption in his office of clerk to the justices. The jury having found a verdict for the plaintiff, the defendant afterwards moved in arrest of judgment, or for a nonsuit or new trial, on the ground that the letter was a privileged communication, and that express malice could not be proved by evidence of falsehood. But the court held, that as the Secretary of State had no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the

Communication to Secretary of State imputing corruption in Office to a Town Clerk and Clerk to Justices.

(r) *James v. Boston*, 2 Car. & Kir. C. & P. 548.

4, per Pollock, C.B.

(u) 5 B. & Ald. 647.

(s) Bac. Ab. Libel, A. 2.

(x) *Harwood v. Green*, 3 Car. & P.

(t) *Fairman v. Ives*, 5 B. & Ald. 141, per Best, C.J.

642 ; and see *Woodward v. Lander*, 6

CHAPTER XI.

Memorial
addressed to
the Home
Secretary,
complaining of
the misconduct
of a magistrate.

application, the communication was not privileged; and that proof of falsehood in part of the statement was evidence for the jury, to renew the presumption of malice, where the occasion of the publication had been evidence to rebut it (y). But where the defendant was an elector and inhabitant of the borough of Frome, and he, with other inhabitants, signed and transmitted to the Home Secretary, a memorial complaining of the conduct of the plaintiff (a justice of the peace for the county of Somerset) during the election of a member of Parliament for Frome. The memorial contained imputations on the plaintiff, to the effect that he had made speeches inciting the people to a breach of the peace; and that after reading the Riot Act, he had given orders to a man to strike persons in the street: and prayed, that the Home Secretary would cause an inquiry to be made into the conduct of the plaintiff, and that on the allegations being substantiated, would feel it to be his duty to recommend to the Queen that the plaintiff should be removed from the commission of the peace. The jury having found that the defendant acted *bonâ fide*; it was held, that although the defendant might have *more properly* addressed the memorial to the Lord Chancellor, in which case it *certainly* would have been privileged, yet it was also privileged, although addressed to the Secretary of State (z). And it was said by Lord Campbell in the same case, that a *bonâ fide* petition to the Queen for the removal of a magistrate, by an aggrieved party living under his jurisdiction, would be a privileged communication (a).

In deciding the case of *Harrison v. Bush* (above stated) Lord Campbell, L.C.J., said the court had bestowed great deliberation, out of respect to the authority of the case *Blagg v. Sturt*. But the substantial difference between the two cases is, that in *Blagg v. Sturt* the jury found *express malice*; in *Harrison v. Bush* it was found that the defendant acted *bonâ fide*.

Publication of
libel by
mistake.

Where the plaintiff was managing director of a company, and the defendant, who was one of the directors, wrote to the chairman of the company directing attention to the plaintiff's accounts, and suggesting certain suspicions of dishonesty. By the same post the defendant had occasion to write to the secretary of the company upon another matter; and by mistake put

(y) *Blagg v. Sturt*, 10 Q. B. 899; 344; 25 L. J. Q. B. 28.
affirmed in Ex. Cham., *ibid.*, p. 906. (a) *Ibid.*, 5 E. & B. 351.
(z) *Harrison v. Bush*, 5 E. & B.

the letter intended for the chairman into the envelope addressed to the secretary, and the letter intended for the latter into the envelope addressed to the chairman. It was held, that the communication to the chairman of the company having been written under circumstances which negatived the presumption of malice, the inadvertent publication to the secretary, though occasioned through the negligence of the defendant, was not, in the absence of express malice, sufficient to render the defendant liable (b). The judgment in that case has, however, been expressly dissented from by the Court of Appeal in a subsequent case, in which the plaintiff had been a candidate for, and elected to, the office of Guardian of the Poor for a parish within the Union of Y.: the defendants, who were ratepayers and voters, and had opposed the plaintiff's election, afterwards under an honest and reasonable, but erroneous, belief that the Board of Guardians were the proper authority to apply to, sent a letter to them containing imputations upon the plaintiff of corrupt practices in relation to the election, in tampering with the voting papers or conniving with others in so doing: the defendants pleaded a justification and privilege: the jury having found that the letter was libellous, and that the justification had not been made out: it was held—that as the Board of Guardians had neither duty nor power to take any action upon the communication made to them, the occasion was not privileged; and that the honest and reasonable belief of the defendants that the Board had such duty or power, and were asking for redress which they believed the Board could give—though such honest and reasonable belief might have a bearing on the question of malice, it had nothing to do with the question of privilege (c).

And where the proprietor of a periodical publication, circulating amongst booksellers and stationers, *by mistake* in the arrangement of the London Gazette announcements, inserted the names of the plaintiff's firm (who were stationers) under the head "First Meetings under the Bankruptcy Act," instead of under "Dissolutions of Partnership;" the jury having found the publication libellous, and assessed the damages at £50, the court refused to arrest the judgment, or to interfere with the finding (d). And a mistake by a newspaper reporter, in giving the wrong address of a solicitor, of the same name as one who

(b) *Tompson v. Dashwood*, 11 Q. B. D. 43; 52 L. J. 425. *others* (1894), 2 Q. B. 59; 63 L. J. 589.

(c) *Hebditch v. MacIlwaine and*

(d) *Shepherd v. Whitaker*, L. R. 10 C. P. 502.

CHAPTER XI.

Letter to an
Incorporated
Law Society
charging
solicitor with
professional
misconduct.

had been required to answer serious charges of misconduct for which he was ordered to be struck off the rolls, is actionable (e). But a mere misstatement in "The Law List" as to the date of admission of a solicitor is not actionable as a libel, though published negligently (f).

Where the plaintiff, a solicitor, declared on a libel contained in a letter addressed to the Incorporated Society of Attorneys and Solicitors of Ireland, of which the plaintiff was a member, charging him with unprofessional conduct. The defendant justified on the ground of privilege, alleging that it was his duty as a member of society, and as such interested in the good conduct of the members of the profession, to bring the plaintiff's conduct under the notice of those who were also interested in the good conduct of its members, and had the power and duty of inquiring into the same; that the defendant *bonâ fide* believing that the said society had full power, and that it was their duty to make such inquiry, &c., wrote the said letter with the *bonâ fide* object of procuring such inquiry and of preventing the repetition of such conduct. On demurrer to this defence, it was held that, apart from social duty, the defendant had sufficient interest in the matter of the complaint to sustain his plea; and that the Incorporated Society had such concern in the matter as rendered the communication privileged (g).

Voluntary
communications to friends
and others.

In the case of a confidential communication made between friends, in the protection of their interests, or to prevent an injury, and not for the purpose of slandering any individual, the occasion justifies the act (h). But if the communication be made maliciously, the confidential relationship will afford no defence: and the falsehood of the facts stated is, in some cases, evidence of malice, notwithstanding the *bonâ fide* belief of the writer or utterer, in the truth of the communication.

To bankers
charging
solicitor with
mismanage-
ment of
professional
matters.

Where the alleged libel was contained in a letter written by the defendant to certain bankers, charging the plaintiff, a solicitor, with improper conduct in the management of their concerns. It appeared, however, upon the trial, that the letter was intended as a confidential communication to the bankers, and that the defendant himself was *interested* in the affairs which he supposed to be mismanaged by the plaintiff. After

(e) *Tucker v. Lawson*, 2 Times L. R. 593.

(f) *Raven v. Sterens & Sons*, 3 Times L. R. 67, per Stephen, J.

(g) *Hammerton v. Green*, 16 Ir. C. L. R. 77 (Lefroy, C.J., *dubitante*).

(h) *Hervey v. Dowson*, B. N. P. 8; *Vanspike v. Clayson*, Cro. Eliz. 541.

the case had been opened by the plaintiff's counsel, Lord Ellenborough, C.J., said, if the letter had been written by the defendant confidentially and under an impression that its statements were well-founded, he was clearly of opinion that no action could be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide* with a view to the interests of himself and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted (i).

So, too, a communication made in the *bonâ fide* belief of its truth, to a surety, as to the fraudulent conduct of the person trusted, is privileged if made in good faith and with the object only of communicating facts to the surety which it was to his interest to know (k).

And where the plaintiff's employer was in communication with the defendants, a society of underwriters, with a view to the insurance of a vessel of which the plaintiff was captain; the society sent a communication by telegram, to the effect that they would not insure any vessel of which the plaintiff was placed in command as captain: the plaintiff thereby lost his employment. It appeared that the defendants, in making the communication, acted without malice, in their own interests, in the conduct of their own affairs, and in the *bonâ fide* belief that the information they had received as to the previous conduct of the plaintiff, as captain of another vessel was true: it was held, that the occasion was privileged; and that the facts above stated, if established, would be an answer to the action (l).

Where the libel complained of was in the form of a notice to an auctioneer, desiring him not to part with the proceeds of a certain sale, as the plaintiff had committed an act of bankruptcy: it appeared that there was an entire absence of malice in fact, and that the defendant believed the statement to be true, and had a personal interest in preventing the money from being paid over to the plaintiff. In an action charging the notice as a libel, it was held, by the majority of

(i) *McDougall v. Claridge*, 1 Camp 267; and see *Cleaver v. Sarraude*, cited by Lord Ellenborough in the same.

(k) *Dunman v. Bigg*, 1 Camp. 269.
(l) *Hamon v. Falle*, 4 App. Cas. 247; 48 L. J. P. C. 45.

CHAPTER XI. the Court, to be a privileged communication, as fairly and honestly made by a person in the conduct of his own affairs, in matters where his *interest* was concerned (*m*). And where a solicitor, who was instructed by a client to obtain payment of a debt due from the plaintiff, sent a similar notice to an auctioneer who was about to sell the plaintiff's goods by auction; it was held, that the occasion was privileged, as the solicitor was acting within the ordinary course of his duty for the protection of his client's interests; and that, as the occasion would have been privileged in the case of the client, it was equally so in the case of his solicitor (*n*).

Letter by one
Creditor to
another
imputing dis-
honesty to
Bankrupt.

And where the defendant was a creditor of the firm of which the plaintiff and another were partners; the plaintiff and his partner got into financial difficulties, and the defendant, who had been engaged in winding up their affairs, wrote a letter to a firm who were also creditors, in which he imputed disgraceful and dishonest conduct to the plaintiff with regard to the available assets of the estate: it was held, that the occasion was privileged, on the ground of the interest which the defendant had in the winding up of the affairs of the plaintiff and his partner (*o*).

Tenant to
Landlord in
protection of
Landlord's
interests.

Where the writer of a defamatory letter acts on any duty, legal or moral, towards the person to whom he writes; or where he has by his situation, to protect the interests of another; that which he writes under such circumstances is a privileged communication. And so where A., being tenant to B., was desired by B. to inform him if he saw or heard anything respecting the game. A. wrote a letter to B., informing B. that his gamekeeper sold game; it was ruled by Parke, B., that if A. had been so informed, and believed the fact to be so, it was a privileged communication; and the gamekeeper could not maintain an action for libel (*p*).

Landlord to
Tenant; com-
plaining of
conduct of
lodgers.

So also, a defamatory communication made by the owner of a house to his tenant, the occupier, imputing disgraceful and immoral conduct to some of the inmates, may be privileged if made *bonâ fide* as between a landlord and his tenant, and without malice (*q*).

Communica-
tions by one
Clergyman to
another defa-
matory of a
Curate.

Where the defendant, the rector of a parish, was informed

(*m*) *Blackham v. Pugh*, 2 C. B. 611; 38 L. J. Ex. 138.
15 L. J. C. P. 290.

(*n*) *Baker v. Carrick* (1894), 1 Q. B.
838; 63 L. J. 399.

(*o*) *Spill v. Maule*, L. R. 4 Ex. 232;

(*p*) *Cockayne v. Hodgkinson*, 5 C. &
P. 543.

(*q*) *Knight v. Gibbs*, 3 Nev. & Man.

469; 1 A. & E. 43.

by a banker with whom he had been on intimate terms for many years, that the plaintiff (who was curate to the rector of another parish in the neighbourhood), was about to preach one of a course of Lenten sermons at a church near by; and that he was sure if the rector knew what sort of a person the plaintiff was he would never permit him to preach in his church. The banker then, in answer to the defendant's inquiry, stated, that the plaintiff had been obliged to leave the army through cheating at cards, that he had lived an irregular life at Cambridge, had been guilty of gross immorality when curate at another place and had boasted of it. The defendant, placing implicit reliance on the banker's statement, and thinking it his duty to acquaint his old friend the rector, at once rode to his house, when, finding he was ill in bed, he communicated his information to the rector's son, who also was a clergyman, and in the house at the time. The defendant also, some time afterwards, consulted his rural dean upon the matter, and by his advice communicated with the plaintiff's rector, who afterwards asked for information. The defendant then wrote detailing the facts of the communication made to him by the banker, but in so doing made use of some expressions that were stronger than those used by the banker. After verdict for the plaintiff with damages, a new trial was ordered: it being held that the several occasions on which the defamatory communications were made were privileged, in the absence of actual malice; and that the jury should have been directed that unless they were satisfied that the defendant did not use those occasions for the reasons which conferred the privilege, but for some indirect reason or motive, they must find for the defendant: and that the burden of proof of such indirect reason or motive was upon the plaintiff (r).

In a case in which the plaintiff was a minor and party to a suit in equity; the defendant was one of a firm of solicitors employed on behalf of the plaintiff in the equity suit: the plaintiff, being desirous of changing his solicitor, informed the defendant of his intention of so doing; the latter thereupon wrote a letter upon the subject to the plaintiff's next friend, who was answerable for the costs of the equity suit; alleging, amongst other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made the plaintiff a present of his indentures, because he was

Letter by
solicitor to
minor's next
friend,
defamatory
of minor.

(r) *Clark v. Molyneux*, 3 Q. B. D. (App.) v. *Delmege* (Resp.), (1891) 237; 47 L. J. 230; and *vide Jenoure* App. Cas. 73; 60 L. J. P. C. C. 11.

CHAPTER XI.

Communica-
tions to
prevent
imprudent
marriages.

Son-in-law to
mother-in-law
volunteering
advice :

Brother to
sister.

Letter to
Plaintiff's
friend, im-
puting insanity
to Plaintiff, a
governess.

worse than useless in his office : it was held to be incumbent on the plaintiff to prove malice in fact ; and in the absence of such proof, that the letter was a privileged communication (s).

It is for the common good of all, and the well-being of society requires, that communications between friends and relations, by way of warning or advice, as to the impropriety or imprudence of a proposed marriage, or with a *bonâ fide* view of preventing such, should be protected.

And accordingly, where a widow lady being about to marry the plaintiff ; the defendant, who had married her daughter, wrote a letter to the widow containing imputations on the plaintiff's character, and urging an investigation : Alderson, B., ruled that the letter was written on a justifiable occasion ; and that the defendant was justified in writing it, provided the jury were satisfied that it was written *bonâ fide* ; although the imputations contained in it were false, or based on erroneous information : and directed the jury that unless they saw that the letter was written with a malicious intention of defaming the plaintiff, their verdict ought to be for the defendant (t).

The law gives great latitude to confidential communications between father and daughter and between brother and sister : but where the defendant wrote a letter to his sister defamatory of the plaintiff, who was her accepted suitor ; the jury awarded £3,000 damages, on the ground of the malicious nature of the letter, and because when offered the opportunity of retracting what he had written, or of disclosing the name of his informant, he refused to do either (u).

Where the libel complained of was contained in a letter, written to a friend of the plaintiff's, conveying imputations of insanity in the plaintiff, alleged in the declaration to have been made in relation to her character as a governess : it was ruled by Martin, B., that such an imputation was *primâ facie* a libel, and the jury were directed, that in order to find a verdict for the plaintiff, they must be satisfied that the imputation was made with reference to her profession as a governess (x). After verdict for the defendant, it was moved on behalf of the plaintiff for a new trial, on the ground of misdirection ; but the court upheld the ruling of the learned judge and refused a rule *nisi* (y).

(s) *Wright v. Woodgate*, 2 C. M. & R. 573.

(t) *Todd v. Hawkins*, 8 C. & P. 88 ;
2 Moo. & Rob. 21 ; and see *Atkinson*
v. Congreve, 7 Ir. C. L. R. 109.

(u) *Adams v. Coleridge*, 1 T. L. R. 84.

(x) *Morgan v. Lingen*, 8 L. T. (N. S.)
800.

(y) Mich. T. 1863, Court of Ex., Ed.
MS.

An opinion of handwriting as to a fictitious letter, if given *bonâ fide*, is a privileged communication. So where a tradesman received a letter in the name of the defendant, containing an order for goods: the goods were sent, but returned by the defendant on the ground that he had not ordered them. At his request the tradesman sent him the letter containing the order; the defendant then wrote to the tradesman stating that in his opinion, and firm belief, the letter containing the order was in the hand-writing of the plaintiff. It was held, that the statement, having been made *bonâ fide*, was a privileged communication (y).

CHAPTER XI.
Letter containing imputation of writing a fictitious letter.

Where, during the absence of the defendant (a haberdasher) the plaintiff's wife came into the defendant's shop and bought some goods. Soon after she was gone his shopman missed a roll of ribbon, and mistakenly supposed that she had stolen it, but did not then pursue her. On the following Monday as she was again passing the shop, the shopman pointed her out to the defendant as the person who had stolen the ribbon. The defendant brought her into the shop, and accused her of the theft, which she positively denied. He then took her into an adjoining room, and sent for her father, to whom he repeated the accusation. In an action by the plaintiff and his wife for slander of the wife, it was ruled by Lord Ellenborough, C.J., that the action could not be maintained: that when a servant represents to a master that his goods have been stolen by a particular individual, it is justifiable for the master, with a view to inquiry, to tax that individual with the theft; and although the suspicion turns out to be erroneous, the law gives no redress to the party accused. The accusation, though unfounded, was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of many instances, where there being a loss without an injury, the sufferer must consider himself not wronged but unfortunate (z). And where the defendant, a tradesman, *bonâ fide* believing that the plaintiff, a servant in the employ of M. who was a customer of defendant's, had, when sent to defendant's shop by M., stolen a box, went to M. and after telling him of his loss, intimated his suspicion of the plaintiff, saying— "There was no one else in the room, and he must have taken it," it was held, that the communication was privileged (a). And of the same class of

Accusations of shop-lifting.

(y) *Croft v. Stevens*, 7 H. & N. 570; Camp. 294.

31 L. J. Ex. 143.

(a) *Amann v. Damm*, 8 C. B. (N. S.)

(z) *Fowler and wife v. Homer*, 3 597; 29 L. J. C. P. 313.

CHAPTER XI.

Communica-
tion by a
neighbour, to
Servant's
mistress, as
to conduct of
Servant.

communications are those recognising the right of a master *bonâ fide* to charge his servant with any supposed misconduct in his service, and to give him admonition and blame (b).

Where the defendant spoke to the plaintiff's mistress, words charging the plaintiff with irregularity in her conduct as a servant-girl; in consequence of which the plaintiff lost her place: the jury were directed to consider whether the words were spoken with the honest intention of giving a neighbour important information of what was going on in her own family, or whether they were spoken in an idle, gossiping and malicious spirit? That if a neighbour make inquiry of another respecting his own servants, that other may state what he believes to be true; but the case is different when the statement is a voluntary act; yet, even in this case, the jury are to consider whether the words were dictated by a sense of the duty which one neighbour owes to another (c).

Accusations of
theft made in
presence of
third parties.

Where a person suspecting and having reason to suspect another of a particular theft, accuses him of it, no other person being present to hear the accusation, no action will lie (d). And although he accuses such person in the presence of others, and it afterwards appears that the suspicion and accusation were wrong; no action can be sustained, unless the jury find that the words were spoken maliciously, or without *bonâ fides*; and that the charge was made before more persons and in stronger language than was necessary; and although no justification be pleaded (e). The mere casual presence of a third party does not take away the privilege, unless it appears that the occasion was abused (f).

Accusation of
drunkenness
and theft made
to Plaintiff's
employer; to a
fellow Servant;
and to others.

Where the defendant was the occupier of a farm, and the plaintiff, a journeyman carpenter, was sent by the landlord's agent to do some repairs at the farm-house: the plaintiff did the work negligently, and got drunk during the performance of it; and circumstances occurred which induced the defendant to believe that the plaintiff had broken open his cellar door and obtained access to his cider. Afterwards the defendant on meeting the plaintiff in the company of a fellow-workman, accused him of breaking open the cellar door, getting drunk,

(b) *Togood v. Spyring*, 1 C. M. & R. 181, 194; *Padmore v. Lawrence*, 11 A. & E. 380; *Force v. Warren*, 15 C. B. (N. S.) 806.

(c) *Rumsey v. Webb and ux.*, 1 Car. & R. 104, per Coltman, J.

(d) *Force v. Warren*, 15 C. B. (N. S.)

806.

(e) *Padmore v. Lawrence*, 11 A. & E. 380; *Wallace v. Carroll*, 11 Ir. C. L. R. 485. But see *Harrison v. Fraser*, 29 W. R. 652.

(f) *Jones v. Thomas*, 34 W. R. 104.

and spoiling the work he was about. The defendant subsequently, in the absence of the plaintiff, repeated the charge to plaintiff's fellow-workman: and on the same day the defendant complained to the landlord's agent that the plaintiff had got drunk and done the work negligently, and that he believed he had broken open his cellar door. It was held—1st, That the complaint to the agent, if made *bonâ fide*, and without malicious intention to injure the plaintiff, was a privileged communication. 2ndly, That the accusation made to the plaintiff in the presence of his fellow-workman was also privileged, if made honestly and *bonâ fide*; that the circumstance of its having been made in the presence of such third person did not of itself make it unauthorised, though that circumstance with others, including the style and character of the language used, might properly be left to the jury to decide whether the defendant acted *bonâ fide* in making the charge, or was influenced by malicious motives. 3rdly, That the statement made to the fellow-workman, in plaintiff's absence, was unauthorised and officious; and therefore *not* a privileged communication, although made in the belief of its truth, if it were in fact false: and that it should have been left to the jury to say whether the defendant acted maliciously or not on that occasion (g).

And where the defendant, the manager of a joint-stock company, charged the plaintiff, a director of the same company, in the presence of one of his co-directors, with having been privy to the preparation and circulation of a balance-sheet which he and such co-director knew to be false and fictitious. It was held on demurrer, by the Court of Exchequer in Ireland, that although the defendant, from his position as manager and shareholder, might have had an interest in making the defamatory communication; yet the plaintiff's co-director, to whom it was addressed, was not shown by the defence to have had any corresponding interest in the subject-matter of the communication, or duty in respect of it, to render the occasion privileged (h).

Manager of a Company charging a Director in presence of another, with the circulation of a fictitious balance-sheet.

A circular issued by a member of a friendly society, to other members of the same society, for the purpose of obtaining a statutory investigation into the solvency of the society, is not privileged if issued with a knowledge that it contains statements that are untrue (i).

Circular by member of Friendly Society to other members.

(g) *Toogood v. Spyring*, 1 C. M. & R. C. L. 282.

181; 4 Tyrw. 582.

(i) *Hill v. Hart-Davis*, 21 Ch. D.

(h) *Waring v. M'Caladin*, 1r. R. 7 798; 51 L. J. 845.

CHAPTER XI.

Part of a communication may be privileged, another part not so.

Letter containing irrelevant matter.

But if relevant to the occasion the whole may be privileged.

If the communication contain several distinct statements, some of which are privileged, and others not, those which are privileged do not shelter those which are not so (*k*). So, one part of a letter may be privileged and the other not: as in a case in which the plaintiff and defendant were jointly interested in certain property of which C. was manager: the defendant wrote a letter to C., chiefly about the conduct of the plaintiff with reference to the property: but containing also a defamatory charge against the plaintiff with reference to his mother and aunt: it was held, that, although that part of the letter which related to the defendant's conduct as to the property might be privileged, such privilege did not extend to the part reflecting on the plaintiff's conduct to his mother and aunt (*l*). So in a case in which the plaintiff instructed his attorney to apply to the defendant for payment of a debt; the defendant in reply wrote a letter to the attorney containing gross imputations upon the plaintiff's character, wholly unconnected with the demand made upon him: it was held, that the letter was *not* a privileged communication; although the jury negatived malice in fact, and found that the letter was written *bonâ fide* (*m*).

Where a solicitor wrote to the defendant, on behalf of a client (the plaintiff) complaining of a defamation of his client's character, and requesting an apology and retraction; and, in the alternative, threatening legal proceedings; the defendant wrote in reply to the solicitor, refusing to retract, and requesting him to inform his client that unless a sum of £6 which he had lent the plaintiff were repaid he would again publicly expose the plaintiff; and concluding as follows:—"I would suggest to you the advisability of looking after your costs, as a man guilty of such baseness as he has been to me in repudiating this debt cannot be trusted." Held, on demurrer to the defence of privilege and justification, that the occasion was privileged; that the contents of the letter were sufficiently relevant and pertinent to the occasion to sustain the defence upon demurrer; but that the question whether the letter was or was not within the privilege consistently with the rule established by the authorities, was a question of mere excess, and should be determined by a jury, not by the court (*n*).

(*k*) *Clarke v. Roe*, 4 Ir. C. L. R. 1.

(*l*) *Warren v. Warren*, 1 C. M. & R. 251; and see *Cooke v. Wildes*, *infra*.

(*m*) *Huntley v. Ward*, 6 C. B. (N. S.) 514; but see *Halloran v. Thompson*,

14 Ir. C. L. R. 334; *Reg. v. Perry*, 15 Cox. C. C. 169.

(*n*) *Jacob v. Lawrence*, L. R. (Ir.) 4 Q. B. D. 579; and see cases as to excess, *infra*, p. 194 *et seq.*

If the person making a communication defamatory of another, does so in the capacity of a stranger, or mere busy-body, having no legitimate interest in the subject-matter of the communication, nor any duty such as would justify him in making it (within the principles above stated) (o), the communication will not be protected; particularly where it touches a man in his office, profession or employment. And so, where the plaintiffs, who were architects, had been employed by a committee to effect the restoration of a church at Skirlaugh. The defendant, a clergyman of the Church of England, wrote to a member of the committee: "I have seen in *The Hull News* that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" This was held to be a libel upon the plaintiffs in their business of architects: that describing the plaintiffs as "Wesleyans" added to the injurious character of the libel; and that it was no defence that the plaintiffs could not show experience in church work, or ecclesiastical architecture, such as, in the opinion of the defendant, was requisite. And it was also held, that the defendant being neither the patron nor the minister of the church, nor a member of the Committee appointed to effect its restoration, nor even a parishioner, the occasion was not such as to render the communication privileged, either on the ground of duty or of interest (p).

CHAPTER XI.

Rule, where absence of any legitimate interest or duty.

But, in a case that was much discussed, where the mate of a ship sent a letter to a personal friend of his, in which he accused the captain of drunkenness and gross misconduct in the navigation of the ship; the friend on receipt of the letter showed it to two persons, and afterwards, in accordance with their advice, communicated it to the owner of the ship, who immediately dismissed the captain. An action of libel was then brought by the captain against the mate's friend. The defendant pleaded—1st, the general issue; 2ndly, a justification (alleging that all the material statements in the libel were true); and 3rdly, that the owner of the ship did not dismiss the plaintiff by reason of the publication of the supposed libel by the defendant. Tindal, C.J., directed the jury that the occasion and circumstances under which the communication

Communication by disinterested party, to a Ship-owner, charging misconduct to Captain.

(o) *Supra*, p. 170.(p) *Botterill and another v. Whytehead*, 41 L. T. 588.

CHAPTER XI.

Difference of
opinion by
Judges of
Common Pleas,
as to.

of the letter took place were such, as in his opinion, furnished a legal excuse for making it: that the inference of malice, which the law, *primâ facie*, draws from the bare act of publishing any statement, false in fact, containing matter to the reproach and prejudice of another, was thereby rebutted; and that the plaintiff, to entitle himself to a verdict, must show malice in fact: and concluded by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed to be a duty: but for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. The jury found for the defendant on the first issue, and for the plaintiff on the second and third. The question as to whether or not the communication was privileged was twice argued; and on each occasion the judges were divided in opinion: it being held, by Tindal, C.J., and Erle, J., that the communication of the letter by the defendant to the owner of the ship was privileged: and by Coltman and Cresswell, JJ., that it was not (*q*). By Tindal, C.J., on the ground that there was no evidence of any sinister motive in the defendant in communicating the letter to the ship-owner: that the defendant did so in the full belief of the truth of the information, and that he was performing a duty, however mistaken he might have been as to the existence of such duty, or in his mode of performing it. That the rule of law is not so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter (*r*). And per Erle, J., on the ground that the information was given for the purpose of preventing damage from misconduct; and that in furnishing such information it is not essential that the *giver* of the information should stand in any relation to the other parties, the rule being founded on the importance of the information to the interests of the receiver (*s*). But per Coltman, J., the communication by the defendant to the ship-owner was not privileged; there was no *legal duty* calling on the defendant to make the communication complained of, and the occasion was in no respect urgent. That upon the

(*q*) *Corhead v. Richards*, 2 C. B. 569; 15 L. J. C. P. 278.

(*r*) 2 C. B. 594, 596.
(*s*) *Ibid.*, 608.

question as to whether there was any *moral* duty binding on the defendant to make the communication, the duty was plainly the other way:—The duty of not slandering your neighbour on insufficient grounds, which (said the learned Judge) “is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity.” And it was no sufficient justification that the defendant acted *bonâ fide* and without malice (t). And per Cresswell, J., on the ground that there was no *legal* duty which bound the defendant to communicate to the ship-owner the contents of the letter he had received; nor was the communication made in the conduct of his own affairs; nor was his interest concerned. That the defendant was not called upon by any *public duty* to make the communication, as neither his own situation nor that of any of the parties concerned, nor the interests at stake, were such as to affect the public weal. That as to any *private duty*, there was no relation of principal and agent between the ship-owner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; the duty, if it existed at all between them, must therefore have arisen from the mere circumstance of their being fellow-subjects of the realm. That if the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other, and the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the ship-owner that which he *believed* to be true. That the mate (if he really believed that which he wrote to be true) might, indeed be under a moral duty to communicate it to his owner, but the defendant had no right to take that vicarious duty upon himself: he was not requested by the mate to do so, but was, on the contrary, enjoined not to make the communication (u).

And in a subsequent case, in which the question arose as to whether a verbal caution, voluntarily, but *bonâ fide*, given to a tradesman, without any inquiry on his part, not to trust a certain customer, was a privileged communication? It was held by Tindal, C.J., and Erle, J., on the same grounds as those stated in their judgments in the above case of *Coxhead v. Richards*, that it was so privileged: and by Coltman and

Caution to a
Tradesman not
to trust a
Customer.

(t) 2 C. B. 599, 601.

(u) *Ibid.*, 603-4.

CHAPTER XI. Cresswell, JJ., also upon the grounds stated in their judgments in the same case, that it was not (x).

It is very remarkable that, after the lapse of nearly fifty years from the date of the judgments in the preceding case of *Coxhead v. Richards*, there should again be a difference of opinion amongst the judges in a subsequent case in which the facts were similar, and the principles involved identical with those in the former case: particularly as it had been held in subsequent cases that the *bonâ fide* belief of the defendant that the defamatory matter was true afforded no defence: and therefore, in the absence of privilege, unless the defendant proves, at the trial, that the defamatory charge is true, the plaintiff is entitled to the verdict (y).

In the subsequent case, which was an action of slander brought by the plaintiff, *a valet*, in the service of Mr. Stanley, the African explorer, against the defendant, who at the time was Mayor of Newcastle. The plaintiff and his master were staying at the Mansion House at Newcastle, Mr. Stanley being a guest of the defendant. They had come direct from Edinburgh, and whilst at Newcastle the chief constable there, received from the superintendent of police at Edinburgh, a letter informing him that a lady's gold watch had been stolen from a bedroom at the hotel where the plaintiff had been staying, and that suspicion had attached to the plaintiff; but stating, that the ground of suspicion was very slender, and that unless the stolen property could be found or traced to his possession, no action could be taken; and urging the utmost caution in any inquiries so as not to injure the plaintiff unless evidence of guilt could be obtained. Notwithstanding the caution urged, the chief constable sent the letter to the defendant, with a message that he thought he, as chief magistrate, ought to see it. The defendant read the letter and returned it; and just before the plaintiff and his master left Newcastle, the defendant, without having instituted any inquiry, called Mr. Stanley aside and repeated to him the contents of the letter; in consequence of which, Stanley, a few days later, dismissed the plaintiff, who was unable afterwards to obtain another engagement. At the trial before Wills, J., that learned judge directed the jury that the occasion of the defamatory communication by the defendant to the plaintiff's master was

(x) *Bennett v. Deacon*, 2 C. B. 628. *supra*, p. 141; *Jenoure v. Delmege*
See *Pictou v. Jackman*, *supra*, p. 169. (1891), App. Cas. 73; *Botterill and*
(y) *Vide Campbell v. Spottiswoode*, *another v. Whythead*, *supra*, p. 187.

not privileged, and the jury found a verdict for the plaintiff with damages £250. The defendant applied for judgment or a new trial, on the ground that the communication *was* privileged, and that there was no evidence of malice. It was held by Lindley and Kay, L.JJ., upon the authority of the judgment of Tindal, C.J., in *Coxhead v. Richards* (z), that the occasion was privileged; that it was the moral or social, although not the legal, duty of the defendant, under the circumstances, to inform the plaintiff's master of the suspicion attaching to the plaintiff: but per Lopes, L.J., the direction of the learned judge at the trial was right; the occasion was not privileged; that considering all the circumstances and the nature of the communication to the chief constable, and its exceptionally cautious character, the defendant was not justified in repeating it to Stanley. It was not made in the conduct of his own affairs in a matter in which his interest was concerned, nor was the defendant, in acting as he did, discharging any duty either legal, social, or moral; nor was it fairly warranted by any reasonable occasion or exigency; that the defendant ought rather to have regarded his duty and what was just towards the person sought to be inculpated (a).

Where a communication is made which is *prima facie* defamatory, and it is sought to be shown that the statement was privileged, the extent of the privilege can only be commensurate with the propriety or fitness of the occasion on which that communication was made (b). And accordingly a clergyman has no privilege, *virtute officii*, in defaming from the pulpit or elsewhere in his church, a parishioner or other person (whether absent or attendant), either on the ground of duty in rebuking sin, or by way of warning (c).

And where the plaintiff had been the schoolmaster of a parish school in which the defendant was rector and also one of the trustees of the school: the plaintiff was dismissed because he refused, on the request of the defendant, to teach a

CHAPTER XL

Extent of privilege only commensurate with occasion.

Clergyman defaming parishioner from the pulpit.

Rector, defaming parish schoolmaster by publication of pastoral letter.

(z) *Supra*.(a) *Stuart v. Bell*, (1891) 2 Q. B. 341; 60 L. J. 577.(b) *Jones v. Thomas*, 34 W. R. 104, per Pollock, B.(c) *Edwards v. Bell*, 1 Bing. 409; *Magrath v. Finn*, 1r. R. 11 C. L. S. 152. And it has been held by the Court of Session in Scotland, that matter grossly defamatory of an individual, uttered by a parish minister

in the course of a sermon from the pulpit, is not protected by privilege. *Adam v. Allan*, 3 Dunlop, 1058; and see *Edwards v. Begbie*, 12 Dunlop, 1134. As to the publication by a cardinal-archbishop and primate, of sentences of ecclesiastical censure, suspension, and interdict, against a Roman Catholic parish priest, see *O'Keeffe v. Cullen*, 7 Ir. R. C. L. 319.

CHAPTER XI. Sunday school, involving additional labour, in connexion with the parish school. On the plaintiff afterwards setting up a school on his own account in the same parish, the defendant printed and circulated, among his parishioners, in the shape of handbills, a pastoral letter, imputing to the plaintiff such a spirit of opposition to authority as to amount to a direct infringement of the precepts of Scripture, and an offence in the eyes of the Deity; and warning his parishioners not to be partakers of his evil deeds, and not to afford their countenance to the new school, either by subscriptions or by sending their children to it for instruction: it was held, that there was no such privilege in the defendant, as rector of the parish, trustee of the parish school, or otherwise, to excuse the publication, either on the ground of *duty* to his parishioners or of *interest* in the welfare of the parish schools (*d*).

Charges of bribery made to rival agents at election.

Parliamentary election agents, whilst conducting an election by rival candidates, are not privileged, either on the ground of duty or interest, in making imputations of bribery upon individuals to members of the rival candidate's committee; nor to the agents of such candidates (*e*).

Trade Protection Societies, defamatory communications by.

It appears that circular letters, and printed reports of trade protection societies, sent *generally* to the members thereof, furnishing defamatory information respecting individuals, their business negotiations or their credit, are not privileged (*f*). But if sent to a *bonâ fide* inquirer, legitimately interested in the inquiry, the communication may be privileged, if the facts stated therein are true, otherwise not.

So it has been held, that the publication in a printed paper, for the information of subscribers to a trade protection society, of fair and correct extracts from official registers of protests for non-acceptance and non-payment of bills of exchange and promissory notes, is privileged: such register being a public document, which all persons have a right to inspect (*g*). And where persons are engaged in mercantile pursuits, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others, they may

(*d*) *Gilpin v. Fowler*, 9 Ex. 615; 23 L. J. Ex. 152; *Brooks v. Blanshard*, 1 Cr. & Mee. 779; 3 Tyrw. 844.

(*e*) *Dickeson v. Hilliard and another*, 43 L. J. Ex. 37; L. R. 9 Ex. 79; *vide* "Corrupt Practices," &c., Act, 1895.

(*f*) See *Goldstein v. Foss*, 6 B. & C. 154, and same on appeal in Ex. Cham.

4 Bing. 489; also *Getting v. Foss*, 3 C. & P. 160; *Humphreys v. Miller*, 4 C. & P. 7; and see an American case to the same effect, *Beardsley v. Tappan*, 5 Blatchf. 497.

(*g*) *Fleming v. Newton*, 1 H. L. Cas. 363, *supra*, p. 106.

communicate to each other, through the hands of a common agent by printing or otherwise, copies of such extracts. If the matter so communicated be libellous, such will be a publication of it; "but the transaction disproves any malice and shows a legitimate object for the act done" (*h*). CHAPTER XI.

But the privilege will not protect the publication of false, erroneous, or unfair extracts prejudicial to the credit and standing of merchants and traders (*i*).

Where a communication is made in a manner more injurious than necessary, it is to that extent libellous. And it should be observed with regard to all those cases in which the occasion affords a conditional protection dependent on the absence of express malice, that the doctrine must be understood with this further qualification, viz.: that the *manner* of the publication is suited to the occasion: for it is clear that where the occasion and circumstances supply, not an absolute but a conditional privilege, they do not admit of the communication being made in an aggravating, violent, excessive, or other improper manner, not warranted by the occasion and circumstances. And therefore it is, that the *style and character* of the *language used*, are circumstances which may be left, with others, to the consideration of the jury, when the question arises as to whether the defamatory words were used with *bona fides*, or were spoken maliciously (*k*). If the language used in making a communication (otherwise privileged) be unnecessarily violent or excessive, it will lose its protection as a privileged communication (*l*). And if *improper motives* be imputed, such will be evidence of malice, and will also be deemed an *excess* of the privilege (*m*).

Although a customer may complain to or remonstrate with a tradesman with whom he deals, as to what he believes to be fraud and dishonesty; yet if he do so outside the door of the tradesman's shop, so as to be heard by the public, or even inside the shop in the presence of third parties, or to third parties; and use language which is extreme and beyond the occasion; such, with the tone and manner in which the words

(*h*) *Fleming v. Newton*, 1 H. L. Cas. 379, per Lord Cottenham, C.

(*i*) *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Saunders v. Seyd & Kelly's Credit Index*, (1896) 75 L. T. 193; 12 Times L. R. 546.

(*k*) See *Two good v. Spyring*, 1 C. M.

& R. 194.

(*l*) *Fryer v. Kinnerley*, 15 C. B. (N. S.) 422; 33 L. J. C. P. 96, *infra*, p. 194.

(*m*) *Cooke and another v. Wildes*, 5 E. & B. 328; *Tuson v. Evans*, 12 A. & E. 73.

CHAPTER XI.

General principle as to excess.

Where there is excess the question of malice must be left to the jury.

Inference from violent language.

Excessive expressions, when not privileged, although malice negatived by jury.

Aggravated communication irrelevant to the matter in hand.

Where the mode, or extent of publication, is in excess of the occasion.

were spoken, will be evidence for the jury to consider whether the words were spoken maliciously and without excuse (*n*).

The principle, with regard to cases of this class, seems to be, that defamatory words are *prima facie* malicious: some occasions rebut the presumption of malice: those are called cases of privileged communication. If, in such cases, the words be more defamatory than the occasion requires, that again raises the presumption of malice. But expressions in excess of what the occasion warrants, do not of themselves divest the communication of the privilege which it would otherwise possess: they can be used only as evidence of malice on the trial before the jury. And therefore where there is an apparent excess beyond the privilege, the plaintiff is justified in requesting the judge to leave the question to the jury as to whether the alleged excess does not show malice, so as to deprive the defendant of the protection which the occasion affords him (*o*).

The language used upon an occasion otherwise privileged, may be so much too strong and violent that—reference being had to the circumstances of the case out of which the occasion of privilege, and the particular communication arose—an inference of actual malice may be drawn from it (*p*).

And it appears, that although the jury should negative the question as to malice, yet if the language has been published in writing, and appears upon the face of the libel to be clearly in excess of the occasion, the communication will not be privileged (*q*).

A communication to be privileged must be spoken with reference to the matter then in hand: if the speaker goes farther and makes a defamatory charge against a person—such charge having nothing to do with the matter in hand—it is not protected; and it is no excuse that the plaintiff had spoken defamatory words of the defendant which might have justified him in bringing an action against the plaintiff (*r*).

As already observed, the class of communications which

(*n*) *Oddy v. Lord Geo. Paulet*, 4 670.

F. & F. 1009, per Lush, J.; and see *Wilson v. Collins*, 5 C. & P. 373, per Bosanquet, J.

(*o*) *Cooke and another v. Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; *Ruckley v. Kiernan*, 7 Ir. C. L. R. 75; *Sayer v. Begg*, 15 Ir. C. L. R. 463.

(*p*) *Robertson v. McDougall*, 4 Bing.

(*q*) *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422; 33 L. J. C. P. 96; and see *Hibbs v. Wilkinson*, 1 F. & F. 608.

(*r*) *Senior v. Medland*, 4 Jur. (N. S.) 1039; and see *Huntley v. Ward*, *supra*, p. 186; also *Wright v. Woodgate*, *supra*, p. 182.

form the subject of the present chapter, do not admit of that general publication allowed to those where the public interest is concerned, such as reports of proceedings of courts of justice. It appears, therefore, that as regards communications of the class here comprised,—to which a conditional protection is given, depending on the absence of express malice,—the doctrine must be understood with this *limitation*, viz.: that the time, mode, and extent of publication be within the limits afforded by the occasion. For it is obvious that, although a person may be justified in making a defamatory communication to a *bonâ fide* inquirer; or voluntarily in the discharge of duty, to persons interested in the subject-matter of the communication; yet he would not be justified in publishing the same to persons who are not so interested; and, therefore, where the mode and extent of publication are more injurious than necessary, a communication (otherwise privileged) loses its protection. The ground upon which a limit is thus placed upon the mode and extent of publication is, that unconcerned persons have no corresponding interest in the communication; consequently, there can be no corresponding benefit or advantage in, nor any necessity for, a publication to them.

The plaintiff may therefore show, in reply to the protection claimed by the defendant on the ground of privilege, that the publication by the defendant was to others than those having an interest, in contemplation of law, in the subject-matter of the communication; and to whom the defendant was under no duty or obligation, legal or moral, to make the communication; and such will generally deprive the communication of the protection otherwise afforded to it.

It has been ruled by Lord Ellenborough, C.J., that an advertisement in a public newspaper, strongly reflecting upon the character of an individual who has been declared bankrupt, is libellous; although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security; if the legal object might have been attained by means less injurious: that the want of proper caution had rendered the publication in question actionable, as being published to the world at large; this made an essential distinction, which applied to all the cases. In the instance of a brief to counsel, the publication as between the attorney and counsel might not be libellous, and yet, if it were

Advertisement reflecting on the character of a Bankrupt.

CHAPTER XI. to be printed and published there might be a libel in every line (s).

Placard
libellous of an
Overseer.

And where the defendant published a placard, stating of the plaintiff, who was an overseer of the poor, that "when out of office he had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust him with £5 of his property": it was held actionable *per se*, without *any innuendo* (t).

Publication by
means of parish
crier, of libel
of an overseer.

Where the libel complained of was in the form of a notice, published and publicly cried and read in the parish, of which the plaintiff was overseer; charging him with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour on a particular tradesman; it was held to be a libel, notwithstanding that the writer was mistaken in supposing that the alleged misconduct was an offence within the meaning of the statute law (u).

Unnecessary
publication in
Newspaper of
affairs defa-
matory of
individuals.

Where a shareholder of a railway company having summoned a meeting of shareholders, invited others, and especially the reporters for the public press, to attend; and at such meeting made defamatory comments on the conduct of the plaintiff (one of the directors), relating to the affairs of the company: it was ruled by Cockburn, L.C.J., that although a discussion of the matter before a meeting of shareholders would have been excused, there was no excuse for a publication to others than shareholders (x).

Incorporated
Company,
liability of for
libel.

An incorporated company is liable to an action for a libel contained in a writing the publication of which is authorised by the company, and which is in furtherance of the objects and business for which the company was incorporated. For if a corporation for its own benefit publishes that which is false and calculated to injure anyone, it is right that it should be held responsible (y).

Imputation of
embezzlement
by Clerk to
Guardians,
made at Board
Meeting.

At a meeting of a board of guardians, at which newspaper reporters were present, the defendant, a member of the board, in the course of a discussion about the plaintiff, who had

(s) *Brown v. Croome*, 2 Stark. R. 297; *Lay v. Lawson*, 4 A. & E. 795; *Finden v. Westlake*, 1 Moo. & Mal. 461.

(t) *Cheese v. Scales*, 10 M. & W. 488.

(u) *Woodward v. Dowsing*, 2 Man. & Ry. 74.

(x) *Parsons v. Surgery*, 4 F. & F. 247; and see *Duncombe v. Daniell*, *supra*, p. 145; *Simpson and another v. Downs*, 16 L. T. (N. S.) 391; *Jackson v. Mayne*, 19 L. T. (N. S.) 399.

(y) *Nerill v. Fine Arts, &c., Insurance Co., Ltd.* (1895), 2 Q. B. 160, per Pollock, B.

recently resigned the office of clerk to the board, made certain defamatory statements imputing that the plaintiff had, during his clerkship, been guilty of embezzlement of public money. At the trial of an action for the slander, the jury found that "the words were spoken honestly in discharge of a public duty, without malice but carelessly," and they gave a verdict for the plaintiff with 40s. damages. It was held that the occasion on which the words were spoken was privileged, and that the presence of the reporters at the board meeting did not, under the circumstances, deprive the defendant's statement of the privilege afforded to it by the occasion (z).

CHAPTER XI

CHAPTER XII.

REPETITIONS OF DEFAMATORY RUMOURS.

Earlier doctrine as to justification by hearsay.

Existence of slanderous rumour no justification for repetition.

Exceptions to the rule.

Libellous articles, reproduction of.

THE doctrine of justification, on the ground that the defendant has done no more than repeat the scandal which he has heard from another, was formally permitted; but it rested on principles so dubious and has been so limited in its modern application, that it is clear that such a justification will not now be allowed to prevail as a defence, without reference to other circumstances, and the actual intention of the publisher.

CHAPTER XII

Earlier doctrine as to justification by hearsay.

And accordingly it has been held, after much argument, and on examination of all the authorities, that in an action for libel, it is not sufficient to plead that the defendant received the libellous statement from another, and that upon publication he disclosed the author's name (a). He must also show that he repeated it on a justifiable occasion, and believed it to be true (b).

Plea that Defendant had the libel of another and gave up author's name.

(z) *Pittard v. Oliver*, (1891) 1 Q. B. 474; 60 L. J. 219; and see *Lawless v. The Anglo-Egyptian Cotton and Oil Co., Ltd.*, 10 B. & S. 226; L. R. 4 Q. B. 262; 38 L. J. Q. B. 129.

(a) *De Crespigny v. Wellesley*, 5

Bing. 392.

(b) *McPherson v. Daniels*, 10 B. & C. 270; *Tidman v. Ainslie*, 10 Ex. 63; and see *Maitland v. Goldney*, 2 East, 426; *Bromage v. Prosser*, 4 B. & C.

247.

CHAPTER XII.

Existence of
slandorous
rumour, no
justification
for repetition.

These authorities have been confirmed in subsequent cases, and it may now be considered as well established, that the existence of a slanderous rumour does not justify the repetition of it, unless it can be shown that such repetition was made on a justifiable occasion, or that the rumour was true. It is no justification to show that the rumour did exist, and that the defendant merely repeated it as a rumour (*c*).

Where in an action for words spoken of the plaintiffs in their business as bankers, it appeared that A. B. met the defendant and said, "I hear that you say that the plaintiff's bank at M. has stopped. Is it true?" The defendant answered, "Yes, it is. I was told so. It was so reported at C., and nobody would take their bills, and I came to town in consequence of it myself." It was proved at the trial that C. D. told the defendant that there was a run upon the plaintiff's bank at M. It was held to be a question for the jury whether the defendant understood A. B. as asking for information, and whether he had uttered the words merely by way of honest advice to A. B. to regulate his conduct: and if they were of that opinion, then secondly, whether in so doing he was guilty of any malice in fact (*d*).

A person who receives information which, if true, is injurious to the character of another, is not justified in publishing that information to the prejudice of him to whom it relates, merely because he believes it to be true (*e*).

When the
originator of
the rumour is
not liable for
repetitions by
third parties.

If the words spoken do not contain the charge of any definite crime or misdemeanour, and are not alleged to be spoken of the plaintiff in the way of his trade or business, so as to impute dishonesty to him in such trade, the words are not actionable *per se*, without special damage; and such special damage must be the direct consequence of defendant's speaking the words; for if he have merely spoken them to A., who afterwards repeats them to B., and the damage ensue through B.'s repeating them (as the words of the defendant) to another person, the damage is too remote, and the defendant will not be liable for the consequences of B.'s repetition of the slander (*f*).

And where the defendant imputed adultery to the plaintiff's

(*c*) *Watkin v. Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125.

(*d*) *Bromage and another v. Prosser*, 4 B. & C. 247.

(*e*) *Botterill v. Whytehead*, 41 L. T. 590, per Kelly, L.C.B.

(*f*) *Ward v. Weeks*, 7 Bing. 211; 4 M. & P. 796. But see per Kelly, L.C.B., *Riding v. Smith*, 1 Ex. D. 91; 45 L. J. 283; and per Bramwell, L.J., *Bree v. Marescaux*, 7 Q. B. D. 434; 50 L. J. 677.

wife, and she voluntarily repeated the slander to her husband, in consequence of which he refused to cohabit with her; it was held, that an action for slander could not be maintained against the defendant (g). And where the defendant, in the presence of the plaintiff's mother, imputed unchastity to the plaintiff, the mother repeated the imputation to the plaintiff, who repeated it to the man to whom she was engaged to be married, and he thereupon broke off the engagement: there being no evidence that the defendant authorised or intended that the imputation should be communicated to the plaintiff's suitor; and such repetition not being the natural consequence of the defendant's utterance; it was held, that an action of slander could not be sustained (h).

Where a person having heard a slanderous rumour of another, *bonâ fide* informs the other of the rumour, not with the object of disseminating the slander, but with the honest motive of enabling the other to clear his character, or to take measures for redressing the grievance, the communication is privileged (i).

And where an actual duty or moral obligation is cast upon the person to whom the slander is uttered, to communicate what he has heard to some third person, as when a communication is made to a husband, such as, if true, would render the person who is the subject of it unfit to associate with his wife and daughters, the slanderer cannot excuse himself by saying, "True, I told the husband, but I never intended that he should carry the matter to his wife": in such a case the communication is an exception to the rule above referred to; and the originator of the slander, and not the bearer or repeater of it, is responsible for the consequences (k). So also, where the plaintiff was a governess, and whilst absent from her employment on a visit to her father, the defendant told her father that she had had a child by her master: her father then went to her master, repeated the charge, and asked if it was true: he replied that it was entirely untrue; and afterwards declined to receive the plaintiff into his service again. After verdict for the plaintiff, with damages, it was urged on motion to set aside the verdict, &c., that the repetition of the charge by the father to the plaintiff's employer had been the cause of the

(g) *Parkins et ux. v. Scott et ux.*, 1 H. & C. 153.

(h) *Speight v. Gonnay*, 60 L. J. Q. B. 281.

(i) *Davies v. Snead*, *infra*, p. 200.

(k) *Derry v. Handley*, 16 L. T. (N. S.) Q. B. 263.

Exceptions to the rule; bonâ fide repetition to person slandered.

When the originator of the slander is liable and not the repeater.

CHAPTER XII. dismissal, and not the original communication of it by the defendant to the plaintiff's father, and that therefore the defendant was not liable, the special damage alleged being neither the legal nor the natural consequence of the words spoken. But the court held, that the repetition of the words by the plaintiff's father to her employer was the natural consequence of the speaking by the defendant, which was very different to the case of an idle repetition by an indifferent person; and notwithstanding that the plaintiff's employer knew the charge to be untrue, he was justified under the circumstances in afterwards refusing to keep the plaintiff in his service: and upon the authority of the case *Knight v. Gibbs* (l), the court held that the dismissal was the legitimate and natural consequence of the imputation by the defendant; and the verdict was upheld (m).

Repetition of slanderous rumour to one of two persons, of a charge affecting both.

When a slanderous statement affecting two persons, jointly, is made to one of them only, under circumstances which, as to such one, render the statement a privileged communication; the statement is also privileged as to the other; who cannot maintain an action for the slander against such utterer (n). And where a person is so situated that it becomes right, in the interests of society, that he should inform another of a slanderous rumour respecting him and a third person; then if he do so *bonâ fide* and without malice, though in the absence of such third person, it is a privileged communication; and neither the person so informed, nor the absentee, can sustain an action against such informer (o).

Showing anonymous letter.

And it has been held, that a man may be justified in showing to a *bonâ fide* inquirer as to the character of another, an anonymous letter he had received a year previously, containing matter highly defamatory of the party who was the subject of the inquiry (p).

Reproduction of privileged statement.

The mere fact that defamatory statements were made in a place and on an occasion that gives them the protection of privilege, does not carry the privilege on to a person who repeats or reproduces them in print, by reference or

(l) *Supra*, p. 180.

(m) *Gillett v. Bullivant*, 7 L. T. (O. S.) 490, per Lord Denman, C.J., and Williams. J.; and see *Pope v. Coates*, 16 Ir. C. L. R. 156, 165.

(n) *Daries v. Sneed*, L. R. 5 Q. B. 608; 23 L. T. (N. S.) 126 and 609; 39

L. J. Q. B. 202.

(o) *Ibid.*; and see *Waller v. Lock*, 7 Q. B. D. 619; 51 L. J. 274; *Clark v. Molyneux*, *supra*, p. 181.

(p) *Robshaw v. Smith*, 38 L. T. (N. S.) 423, per Grove and Lindley, JJ.

otherwise, on an occasion to which the privilege does not extend (q). CHAPTER XII.

If words not actionable, be *spoken* by one person and repeated in *writing* by another, and so become actionable; the latter alone is responsible. And so, where offensive, but not actionable words, spoken by one person, were written and then published by another; it was held to be no defence to an action of libel against the latter, that the publication revealed the name of the author; for as the original words were not actionable, as spoken, the defendant had not afforded the plaintiff any cause of action against any other person; and therefore, as the words, when reduced to writing, were clearly libellous and actionable, and no action could be maintained against any one but the defendant, he was necessarily responsible (r). And where a person has told, to a circle of his own acquaintance, a ludicrous story of himself; another person is not justified, without his authority, in putting the details of the story into print, and publishing them in a newspaper, to the ridicule of the person who so related the story (s). And so also if a man receive a letter, with authority from the author to publish it, the person receiving it will not be justified, if it contain libellous matter, in inserting it in a newspaper (t).

Repetition by writing, of slander not otherwise actionable.

When libellous matter has been published, and another repeats it, and puts it in circulation, such repetition is none the less a libel. To use a commercial metaphor, the "indorsing" a libel by repeating and putting it into circulation, gives additional credit to it, and is an aggravation of the mischief (u).

If one newspaper copy and publish a libellous article from another, the paper so copying and publishing makes that article its own, and is responsible for such reproduction. The fact that the article has previously appeared in another newspaper may, in some cases, have an important influence upon the amount of damages to be awarded: and it may, in some cases too, affect the question of libel or no libel; particularly if the reproduction be accompanied by observations which may make it innocent. But, as a general proposition, the mere fact that a libellous article, published in a newspaper, had previously been published in another, affords no justification

Libellous articles reproduced from other newspapers.

(q) *Vide Lawrence v. Newberry*, 64 L. T. 797; 39 W. R. 605.

(t) *De Crespigny v. Wellesley*, 5 Bing. 404.

(r) *M'Gregor v. Thwaites*, 3 B. & C. 24.

(u) *De Crespigny v. Wellesley*, 5 Bing. 402.

(s) *Cook v. Ward*, 6 Bing. 415.

CHAPTER XII to an action of libel against the publisher of the newspaper so copying and reproducing it (*x*). Where one newspaper copied a libellous paragraph from another, adding the word "fudge!" at the close: it was ruled by Lord Lyndhurst, C.B., in an action against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say with what motive the publication was made by the defendant; and what was meant by the addition of the word "fudge" (*y*). The reproduction and publication in an English newspaper of an after-dinner speech, published in American newspapers, casting ridicule upon the plaintiff, a musical and theatrical agent, was held to be libellous, and so found by the jury, with damages (*z*).

Re-assertion of
Slander.

Where a person is himself the originator of a false and defamatory rumour prejudicial to a tradesman; and being called on by the employers of the tradesman to examine into the facts of the matter complained of, reasserts the false statement; such is not a privileged communication (*a*).

CHAPTER XIII.

MALICE: AND EVIDENCE OF MALICE.

OCCASION: CONDITIONAL PRIVILEGE.

Malice in law, as distinguished from malice in fact.

Inference of malice, how rebutted.

Malice as applied to a Corporation.

Intention not a question for the jury in civil proceedings.

Evidence of Defendant's Malice.

When Malice a mere inference of law.

When express Malice must be proved.

What is evidence of express Malice.

When inference of Malice repelled.

When the question of Malice should not be left to Jury.

When plaintiff entitled to have question of Malice submitted to Jury.

Falsehood of the imputation, when Evidence of Malice.

Refusal to retract or disclose name of informant.

Mode and extent of publication, Malice derived from.

Previous publications may be evidence of Malice.

Evidence of subsequent Libels and statements.

Repetitions and reassertions after action brought.

CHAPTER XIII. INDEPENDENTLY of the occasion and circumstances, it seems to be clear, as well upon legal principles as on those of

(*x*) *Lewis v. Walter*, 4 B. & Ald. 605.

(*y*) *Hunt v. Algar and others*, 6 C. & P. 245.

(*z*) *Dolby v. Newnes*, 3 Times L. R. 394, per Stephen, J.

(*a*) *Smith v. Matheux*, 1 Moo. & Rob. 151, per Lord Lyndhurst, C.B.

morality and policy, that where the wilful act of publishing defamatory matter derives no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and malicious intention to injure, beyond that which is necessarily to be inferred from the very act itself. For if a man wilfully does an act likely to occasion mischief to another, and to subject him to disgrace, obloquy, and temporal damage; he must, in point of law as well as morals, be presumed to have contemplated and intended the evil consequences which were likely to ensue.

CHAPTER XIII.

Absence of intention to injure, no excuse.

To run the risk of effecting a serious injury to another, even from want of due care and attention, is necessarily an offence against the first principles of morality; and even were it otherwise, it would be highly impolitic and inconvenient, as a rule of law, to permit a man to destroy the characters of others, provided he was not actuated by motives of express malice, but acted without consideration, heedless of consequences. The law, therefore, not only considers him to be in fault, who wilfully does an act likely to occasion mischief, but also every one who produces such consequences by culpable carelessness and want of due regard to the interests of others. Such principles apply themselves to the particular cases of slander and libel too forcibly to require any laboured application.

When the law has once defined the right to character and reputation, it follows as a legal consequence, that any one who wilfully deprives another of the enjoyment of that right, offends against the law, and is bound to make reparation in damages co-extensive with the injury. If such observations be well founded it is clear that, if malice be used as descriptive of this species of injury, it must be understood not generally of actual malice, in the ordinary and popular sense of the term; or, as it has sometimes been called, *malice in fact*; but of malice in its *legal* and technical sense, as merely denoting that which is to be inferred from the doing of a wrongful act, without lawful justification or excuse.

Malice in fact—in the common acceptance of the term—signifies not only spite or ill-will, but any wicked or mischievous intention of the mind; or the doing or conceiving of any revengeful or mischievous act, with the intention of injuring another, or from motives of ill-feeling towards another.

Malice in fact as distinguished from malice in law.

CHAPTER XIII. *Malice in law*, or more properly, malice by *inference* of law, signifies the doing of a hurtful or wrongful act without just cause or lawful excuse. And accordingly, the publication of defamatory matter in any form is presumed to be malicious, whatever the intention; unless published in the performance of some duty, legal, social or moral, or in the exercise of some right or privilege (*b*).

If a man publish defamatory matter of another without lawful excuse or justification derivable from collateral circumstances, the law presumes against such a man that he intended the evil consequences of his act: and therefore in such a case the malice necessary to support the action is established against him by that inference or presumption of law; and he is precluded from asserting as against the person whom he has injured, that he did not intend the mischief flowing from his act. Such is called "*malice in law*," but which might perhaps more correctly be termed "*malice by inference of law*."

When malice
an inference
of law.

Inference of
malice; how
rebutted.

And accordingly, where a publication is proved to be defamatory, the law infers malice, unless anything can be drawn from the circumstances of the publication to rebut the inference (*c*). But where the inference of malice is a mere inference of law, it is capable of being rebutted by proof of such an occasion of publishing as furnishes a legal excuse for the act. And the inference of malice arising from the publication of libellous matter is rebutted by showing that it was published upon a lawful occasion (*d*): and being rebutted, it is then for the plaintiff to show affirmatively that the words were spoken maliciously (*e*).

If the imputations are false in fact, and published without a justifiable occasion, the law implies malice (*f*). And where a publication is injurious on the face of it, or where slanderous words are used which are actionable in themselves, and no justifiable cause is shown for publishing or uttering them, the law will presume malice, whether any injury was intended or not (*g*): and therefore in such cases the question of malice

(*b*) See *Bromage v. Prosser*, 4 B. & C. 247; *Brown v. Croome*, 2 Stark. Ca. 297. per Lord Ellenborough, C.J.; *Hakewell v. Ingram*, 2 C. L. R. 1854, p. 1402, per Cresswell, J.

(*c*) Vide *Brown v. Croome*, 2 Stark. Ca. 227; *Bromage v. Prosser*, 4 B. & C. 247; *Status v. Finlay*, Ir. L. R. 8

C. L. 283.

(*d*) *Hoare v. Silverlock* (No. 2), 9 C. B. 20; 19 L. J. C. P. 215.

(*e*) *Somerville v. Hawkins*, 10 C. B. 590.

(*f*) *Darby v. Ouseley*, 1 H. & N. 1.

(*g*) *Chalmers v. Payne and another*, 2 C. M. & R. 159.

should not be submitted to the jury. As in a case in which the defendant having some cause for suspicion, went to the plaintiff's relations and charged the plaintiff with theft ; but, it appearing from the evidence that the defendant's object in so doing was to induce the plaintiff's friends to compromise rather than to investigate the matter ; it was held, that such was not a privileged communication, and that the existence of malice must be implied, and should not be left as a question of fact for the jury (*h*). And where the jury were directed to find whether a libel submitted to their consideration was a privileged communication, and if so, whether it was attended with express malice ; and the jury having found for the plaintiff with damages £50, but that the defendant was not actuated by express malice ; it was held, that notwithstanding that the jury had negatived the existence of express malice, yet by finding for the plaintiff, they found that the communication was not privileged, and in that case malice in law was implied from the doing of a hurtful act for which there was no excuse (*i*).

And it appears that for a libel published by a Corporation, on an occasion that is not privileged, malice may be implied. But as to the liability of a Corporation for the publication of a libel where the occasion is privileged, and therefore requiring proof of actual malice, the question was argued in a recent case but not decided (*k*). In a subsequent case, however, it was held, that a Corporation may be liable for the malicious act of their servant in publishing a libel (*l*).

Malice :
question of as
applied to a
Corporation.

In civil proceedings, in the absence of proof that the publication was made on a justifiable occasion, the question of intention should not be submitted to the jury. And where the judge left it to the jury to say whether the defendant intended to injure the plaintiff, it was held that the direction was wrong, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequences of his own act (*m*). And so, in a subsequent case, it was held, that the judge must not leave the fact of the defendant's intention as a question for the jury, except so far as the intention may be shown by the tendency of the

Intention not
a question for
the jury in
Civil proceed-
ings.

(*h*) *Hooper v. Truscott*, 2 Bing. N. C. 156 ; (1897), A. C. 68 ; 64 L. J. 681. 457 ; 2 Scott, 672.

(*i*) *Blackburn v. Blackburn*, 4 Bing. 395. (*l*) *Citizens' Life Assurance Co. (App.) and Brown (Resp.)* (1904), A. C. 423.

(*k*) *Vide Nerille v. Fine Arts and Gen. Ins. Co., Ltd.* (1895), 2 Q. B. (*m*) *Haire v. Wilson*, 9 B. & C. 643.

CHAPTER XIII. publication itself (*n*). And, therefore, whatever the intention of a public writer, and although his main object be to endeavour to bring about a change in the law, and not to defame any person; yet, if in order to attain that object he publish matter defamatory of an individual, he is liable for it as a libel (*o*).

Protection to
printer and
others under
the Libel Act,
1843.

Under the Libel Act, 1843 (*p*), the printer, publisher, or other defendant in an *action* for a libel, contained in any newspaper or other periodical publication, may now plead that such libel was inserted without malice and neglect, and that at the earliest opportunity he published, or offered to publish, an apology; but he must, on filing such plea, pay money into court as amends (*q*). And where the proceedings are by *indictment* the defendant may now prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part (*r*).

When malice a
mere inference
of law.

Evidence of Defendant's Malice.—Where words have been uttered, or a libel published of the plaintiff, by which actual or presumptive damage has been occasioned, the malice of the defendant is a mere inference of law from the very act; for the defendant must be presumed to have intended that which is the natural consequence of his act (*s*). In such instances, therefore, it is unnecessary to give evidence of malice-in-fact, except for the purpose of enhancing the damages. And where the communication is made on an occasion that is *not* privileged, it is unnecessary for the plaintiff to give evidence of malice. But where the occasion is privileged, the plaintiff, in order to sustain his action, must give evidence of malice, either intrinsic or extrinsic, showing that the defendant abused or exceeded his privilege. For in such cases, the occasion and circumstances of the speaking or publishing, repel the action, either peremptorily and absolutely, or unless express malice exist: and in this latter class of cases, where *actual malice* is essential to the action, it lies on the plaintiff to prove the fact (*t*). And so where the judge at the trial ruled, that the occasion on which the defamatory

When express
Malice must
be proved.

(*n*) See *Baylis v. Lawrence*, 11 A. & E. 924.

(*o*) *Hakewell v. Ingram*, 2 C. L. R. 1854, p. 1402, per Cresswell, J.

(*p*) 6 & 7 Vict. c. 96, s. 2.

(*q*) 8 & 9 Vict. c. 75, s. 2.

(*r*) 6 & 7 Vict. c. 96, s. 7; and see

The Queen v. Holbrook, 4 Q. B. D. 42; 47 L. J. 35; 48 L. J. 113.

(*s*) *Bromage v. Prosser*, 4 B. & C. 247; *Hooper v. Truscott*, 2 Bing. N. C. 457.

(*t*) *Harris v. Thompson*, 13 C. B. 333.

matters were published was a privileged one; and then directed the jury that the burden of proving that they were not made maliciously was upon the defendant; the Court of Appeal held, that such was a misdirection, and granted a new trial (*u*). CHAPTER XIII.

Where, therefore, the burden of proving express malice is thus thrown upon the plaintiff, he may give evidence of any personal hostility, spite or ill-will, shown or entertained against him by the defendant: or of any other corrupt or improper motive. He may also give in evidence any expressions of the defendant, whether they be oral or written, which indicate spite and ill-will, for the purpose of showing the temper and disposition with which he made the publication complained of: for although a person who makes a charge against another, may be justified by the occasion in making it, yet he may make that charge in such a manner, accompanied by such expressions and such surrounding circumstances as furnish proof that it was made maliciously (*x*). What is evidence of express Malice.

If the occasion be such as repels the inference of malice, the communication is *primâ facie* privileged: and the plaintiff must then, if he can, give evidence of actual malice: if he give no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant (*y*). Otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and if the jury conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff, on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice (*z*). When inference of Malice repelled.

It is, therefore, matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a "privileged communication": and if, at the close of the plaintiff's case, the judge rules that the occasion was privileged; then, if there be no intrinsic or extrinsic evidence of malice, it is the

(*u*) *Clark v. Molyneux*, 3 Q. B. D. 237; 47 L. J. 230.

(*x*) *Senior v. Medland*, 4 Jur. (N. S.) 1040, per Pollock, C.B.

(*y*) *Taylor v. Hawkins*, 16 Q. B.

321; and see *Hesketh v. Brindle*, 4 Times L. R. 199, per Manisty and Grantham, JJ.

(*z*) Per Lord Campbell, C.J., in *Taylor v. Hawkins*, *supra*.

CHAPTER XIII. duty of the judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury ; as a different course would be contrary to principle, and would deprive the honest transactions of business and of social intercourse, of the protection which they ought to enjoy (a).

Malice
intrinsic and
extrinsic.

But whenever evidence of malice, either intrinsic or extrinsic, is adduced in answer to the immunity claimed on the part of the defendant by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine (b).

The Libel must
be shown to
the Jury.

The onus of proving malice in fact, is therefore thrown upon the plaintiff ; but not of proving it by extrinsic evidence only : he has still a right to require that the alleged libel shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it (c) : for it would be absurd to say that the writing, being a privileged communication, should not be seen by the jury ; but that they were to find their verdict on the extrinsic facts alone (d). The jury may look both to the matter and the manner of the publication for the purpose of deciding on the question of malice (e).

When the
question of
Malice should
not be left to
the jury.

The existence of express malice is only a matter for inquiry by the jury where the words, or libel complained of, have been uttered or published upon a lawful occasion, so as to become a privileged communication (f). But where the act of the defendant is unsupported by any presumption of law, supplied in his favour by the occasion and circumstances of the act, which is in itself plainly hurtful and injurious to another, the very act itself supplies evidence of malice, and the onus of exculpation is thrown upon the defendant (g).

When Plaintiff
entitled to
have the
question of
Malice sub-
mitted to the
jury.

In order to entitle a plaintiff to have the question of malice submitted to the jury, it is not necessary that the evidence should be such as directly leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice ; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence (h) ; for, as already shown, where

(a) *Vide Cooke and another v. Wildes*,
5 E. & B. 340 ; 24 L. J. Q. B. 367.

(b) *Ibid.*, p. 341.

(c) *Wright v. Woodgate*, 2 C. M. &
R. 573.

(d) *Gilpin v. Fowler*, 23 L. J. Ex. 156.

(e) *Vide Adams v. Coleridge*, 1

T. L. R. 87.

(f) *Hooper v. Truscott*, 2 Bing.
N. C. 457, 464 ; *Godson v. Home*, 1
Brod. & Bing. 7.

(g) 2 Stark. Ev. 676.

(h) *Somerville v. Hawkins*, 10 C. B.
590 ; 20 L. J. C P. 131.

the occasion is privileged, the presumption of law is, that the communication was made *bonâ fide*; therefore, in order to rebut that presumption, it is incumbent on the plaintiff to show actual malice; which he may do by reference to the terms of the libel itself, as being disproportioned to the exigency of the occasion (i).

It is for the judge to decide whether the defendant at the time of making the communication, stood in the position of a privileged person in relation to the occasion and circumstances of the case, as given in evidence. And where the judge rules that the communication in question is privileged; i.e., that it was made under circumstances which rebut the presumption of malice; it is not sufficient for the plaintiff to show a *mere possibility* of malice in order to entitle him to have the question submitted to the jury; as such would be inconsistent with the rule above stated, that the absence of malice is presumed where the occasion of making the communication is privileged. There must therefore, in order to entitle the plaintiff to have the question of malice submitted to the jury, be a *probability* of malice as distinguished from a possibility, and the judge should be satisfied that there is such a probability before he allows the case to go to the jury (k).

And where the case has been submitted to the jury on the question of malice, with a proper direction, and they find for the plaintiff, the verdict will not be disturbed on the suggestion that the evidence was equally consistent with *bona fides* on the part of the defendant as with malice (l).

Where the defendant had brought a charge against the plaintiff and caused her to be searched for a missing brooch, which was afterwards found in the defendant's possession; it was held to be a question for the jury whether the charge was made *bonâ fide*; and that the circumstances and occasion of making it should be left to their consideration (m).

And so also where the plaintiff, a parish schoolmaster, had been dismissed because he declined, on the request of the rector of the parish, to undertake the duties of a Sunday-school in addition to those of the parish-school; and afterwards, being

(i) *Spill v. Maule*, L. R. 4 Ex. 232; 2 Times L. R. 614; *Thomas v. Bradbury, Agnew & Co.*, 2 K. B. (1906), 38 L. J. Ex. 138.

(k) *Somerville v. Hawkins*, *supra*; C. A. 627.

Taylor v. Hawkins, 16 Q. B. 308.

(m) *Padmore v. Lawrence*, 3 P. & D.

(l) *Vide Blagg v. Sturt*, 10 Q. B. 209.
904; and see *Murdock v. Funduklian*,

CHAPTER XIII. about to set up a school, on his own account in the same parish ; the defendant, who was one of the trustees of the parish-school, printed and circulated, in the form of a pastoral letter, certain libellous statements imputing to the plaintiff "a spirit of opposition to authority," and that he (the rector) "conceived it to be his duty to warn all his parishioners against offering any countenance whatever to the new school, either in the case of the richer, by subscriptions or of the poorer, by sending their children to it for instruction. That it would be to all intents and purposes a schismatical school, and that its tendency would be to produce disunion and schism in a matter, which of all others required union,—the education of the poor, and that those that aided or abetted him in any way would be partakers with him in his evil deeds." The jury having been directed that the communication was privileged, that there was no evidence of malice, and that they were bound in law to find a verdict for the defendant ; a Bill of Exceptions was tendered to this ruling ; and it was held, by the Exchequer Chamber, that there was no privilege in the plaintiff to publish such a letter ; and that even if there were, there was evidence of malice on the face of it : that the attempt to injure the plaintiff in the business he was carrying on gave a complexion to the libel, and might be looked at by the jury in considering the question of malice ; that the libel itself should have been submitted to the jury ; that the general feeling exhibited in it, the attempt to make the plaintiff's conduct a matter of spiritual delinquency, to exhibit it as something unchristian-like, such as would not have been done by a person willing to obey the Holy Scriptures ; were all matters fit to be left to the jury, to say whether there was actual malice or not (*n*).

Violent, excessive, or exaggerated language may be evidence of Malice.

The style and character of the language used are also circumstances which may be left, with others, to the consideration of the jury, when the question arises as to whether the defamatory words were used with *bona fides*, or were spoken maliciously (*o*). If the language used in making a communication (otherwise privileged) be unnecessarily violent, excessive, exaggerated, or more defamatory than the occasion requires, the presumption of malice arises, and must be decided by the jury as a question of fact (*p*). But the mere fact that language used is

(*n*) *Gilpin v. Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 152.

(*o*) *Too good v. Spyring*, *supra*, pp. 184—5.

(*p*) *Fryer v. Kinnerley*, 15 C. B. N. S. 422 ; *Cooke and another v. Wildes*, 5 E. & B. 328.

somewhat strong, or not altogether temperate, will not, in the absence of any indication that it was not used *bonâ fide*, be evidence of malice (q). CHAPTER XIII.

And where a defamatory communication is published in self-defence, although there may be some expressions contained in it which go beyond what is necessary for self-defence, still it does not follow that they afford evidence of malice which the plaintiff is entitled to have submitted to a jury. To submit the language of privileged communications to strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion, to be evidence of malice, would in effect greatly limit, if not altogether defeat that protection which the law throws over privileged communications (r).

Malice may also be proved by extrinsic evidence; as by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill-will (s); or that the plaintiff and defendant lived on bad terms, if it bears upon the issue of malice, such, for instance, as provocation by former disputes, or anything tending to excite the defendant's ill-will towards the plaintiff; and the judge will be justified in asking the jury if they infer malice from such conduct (t). And where the defendant, a candidate for Parliament, published defamatory matters of the plaintiff, a rival candidate, imputing to him atheism and blasphemy; the defendant having admitted, in the course of his cross-examination, that he published the same with a view to further the chances of his own election and to damage the chance of his rival; such was ruled to be evidence of an improper and indirect motive; and was so found by the jury (u). Extrinsic evidence of Malice.

Where the communication is *primâ facie* privileged, the defendant's conduct in pleading a justification which he does not attempt to prove, or fails in proving, and will not abandon, may be taken into consideration as proof of malice and aggravation of the injury (x). But the mere fact of pleading a justification is not of itself evidence of malice (y). Failure of proof of justification, and refusal to abandon it at the trial.

(q) *Edmondson v. Birch & Co.*, 1 K. B. (1907), C. A. 381.

513; 18 L. J. Q. B. 73.

(r) See *Laughton v. The Bishop of Sodor and Man*, 9 Moo. P. C. C. (N.S.) 337; L. R. 4 P. C. Ap. C. 508; 42 L. J. P. C. 16.

(u) *Pankhurst v. Hamilton*, 3 Times L. R. 500, per Grove, J.

(s) *Wright v. Woodgate*, 2 C. M. & R. 573.

(x) *Simpson v. Robinson*, *supra*; *Warwick v. Foulkes*, 12 M. & W. 509.

(y) *Wilson v. Robinson*, 7 Q. B. 68; *Caulfield v. Whitworth*, 16 W. R. 936; *Brooke v. Avrillon*, 42 L. J. C. P. 126.

(t) *Simpson v. Robinson*, 12 Q. B.

CHAPTER XIII.

Falsehood of the imputation when evidence of Malice.

When statement made with reckless indifference as to truth or falsehood.

Refusal to retract, or to disclose name of informant.

Mode and extent of publication : malice derived from.

In an action for a libel contained in an answer to inquiries respecting the character of a servant, the jury may find express malice from the mere fact that the answer complained of was false to the knowledge of the defendant(z). So also by evidence that the imputation is *in part* false, even where the communication is of such a nature as to raise a *primâ facie* presumption of the absence of malice (a). But where defamatory words are spoken on a privileged occasion, the mere proof that they are false, without evidence that they are false to the defendant's knowledge, will not entitle the plaintiff to have the question of malice left to the jury (b).

If the defendant publish the defamatory matter knowing at the time that it was false, or recklessly indifferent as to whether it was true or false ; and it is afterwards found to be false, such will be evidence of malice proper to be submitted to the jury. So also if, out of anger, or some other wrong motive, it be shown that the defendant published the defamatory matter, as a truth, or as true, without knowing or inquiring whether it was true or not, such will be deemed reckless by reason of his anger or other wrong motive, and therefore evidence of malice for the jury (c).

Where the defendant asserts in a libellous letter, that he knows the statements contained in it to be true, and that they were communicated to him in confidence, and yet refuses, on request, to disclose the name of his confidential informant, such is evidence of malice (d).

And where the defendant, having heard a statement defamatory of the plaintiff, repeats it ; and on inquiry by the plaintiff, refuses to state from whom he heard it, such will be evidence of malice : *aliter*, if, with a view to enable the plaintiff to trace the slander to its real author, he gives up the name of his informant (e).

Evidence of malice may also be derived from the mode and extent of publication. The mode of publication is sometimes an important element for the consideration of the jury upon the question of malice, for if it be more injurious than the occasion and circumstances require, the communication loses

(z) *Fountain v. Boodle*, 3 Q. B. 5.

(a) *Blagg v. Sturt*, 10 Q. B. 899 ; and see *Cooke v. Wildes*, *supra*.

(b) *Caulfield v. Whitworth*, 16 W. R. 936 ; 18 L. T. (N. S.) 527, C.P. ; *Neville v. Fine Arts and General Ins. Co., Ltd.* (1895), 2 Q. B. 156 ; 64 L. J.

681 ; App. Cas. (1897), p. 68.

(c) See *Clark v. Molyneux*, 3 Q. B. D. 237 ; *Royal Aquarium, &c., Society v. Parkinson* (1892), 1 Q. B. 444.

(d) *Adams v. Coleridge*, 1 T. L. R. 84.

(e) Vide *Richards v. Richards*, 2 Moo. & Rob. 559, per Cresswell, J.

its privilege. And so if the extent of publication be beyond the occasion, such also may be evidence of malice. CHAPTER XIII.

In some cases the manner in which the publication is made affords in itself strong evidence of malice: for instance, the transmission, unnecessarily, of libellous matter by telegraph, or by post-card, when it might have been sent by letter, is evidence of malice (*f*). And where the defendant assumed to himself the character of reporter, and sent to several newspapers reports of the trial of a case in which he had acted as solicitor against the plaintiff; which reports contained matter defamatory of the plaintiff; the jury having found that the report, though fair, was sent with a malicious motive, the defendant was held liable (*g*). And whenever a means more injurious than necessary is resorted to for the publication of defamatory matter, it affords evidence of malice, though the communication be in other respects privileged.

Solicitor
sending report
of trial to
Newspapers.

Where the charge imputes incompetency in one particular transaction, evidence which does not deny incompetency in that transaction, but proves general competency only, is not admissible (*h*). Subsequent acts may, however, indicate the existence of motives on a former occasion (*i*).

Words spoken by the defendant on a former occasion, in relation to the same transaction, are receivable in evidence to show the *animus*. So a record in a former action between the same parties, relating in substance to the same slander, was allowed to be given in evidence on the part of the plaintiff (*k*). And where the defendant pleaded the general issue, and also a plea under the stat. 6 & 7 Vict. c. 96, denying actual malice, and stating an apology: on the trial, the plaintiff, in order to prove malice, tendered in evidence other publications by the defendant of and concerning the plaintiff, some of them published more than six years before the alleged libel; it was held, that such publications were admissible in evidence for the purpose of showing that the defendant wrote the libel in question with actual malice against the plaintiff (*l*). And it was also held in the same case, that a long practice of libelling the plaintiff might show, in the most satisfactory manner, that the defendant was actuated by malice in the particular

Previous publi-
cations may be
evidence of
Malice.

- (*f*) *Williamson v. Freer*, L. R. 9 v. *Boodle*, 3 Q. B. 5.
C. P. 393; 43 L. J. C. P. 161. (i) *Simpson v. Robinson*, 18 L. J.
(*g*) *Stevens v. Sampson*, 5 Ex. D. 53; Q. B. 73; 12 Q. B. 511.
49 L. J. 120. (k) *Jackson v. Adams*, 2 Scott, 599;
(*h*) *Brine v. Bazalgette*, 3 Ex. 693; *Symmons v. Blake*, 1 Moo. & Rob. 477.
18 L. J. (N. S.) 348; but see *Fountain* (l) *Barrett v. Long*, 3 H. L. 395.

CHAPTER XIII. publication; that it did not take place through carelessness or inadvertence; and that the more the evidence approached to the proof of a systematic practice, the more convincing it was. The circumstances that the other libels were more or less frequent, or more or less remote from the time of the publication of that in question, merely affected the weight, not the admissibility, of the evidence (*m*).

Insertion of
Libel in other
newspapers.

The insertion of the same libel in substance in other newspapers, is evidence of malice, although there be counts in the declaration to meet such other publications (*n*). So also where a libel has been published of the plaintiff in a newspaper, a paragraph subsequently published in the same newspaper, affirming the truth of the libellous matter, was held to be admissible in evidence to show the intention of the defendant in publishing the libel declared on (*o*).

Repetitions
and re-asser-
tions of the
libel or slander
after action
brought.

On the trial of an action against the publisher of a monthly periodical, for a libel contained in it, Park, J., was of opinion that *articles* published from month to month, alluding to the action, and attacking the plaintiff, were admissible in evidence for the purpose of showing the motive and animus of the defendant (*p*). So also for the purpose of showing malice, evidence may be given on the part of the plaintiff, of *statements* made by the defendant after action brought: such as a repetition of the words complained of; but evidence cannot be given of words subsequently spoken, if they are such as would be the subject of another action (*q*).

Letters to third
parties contain-
ing repetitions
of the Libel.

Upon principle, the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff; and therefore, evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action. And so, in an action of libel, the plaintiff, in order to show the animus of the defendant, gave in evidence two letters written by him to third parties, subsequently to the commencement of the action, one of them four months after the libel complained of; containing substantially a repetition of the libel: it was held, that they were properly received in evidence; although the libel declared on was free from ambiguity: and it was also held, that

(*m*) *Barrett v. Long*, 3 H. L. 414.

(*p*) *Chubb v. Westley*, 6 C. & P.

(*n*) *Delegal v. Highley*, 8 C. & P.

436.

444.

(*q*) *Defries v. Davis*, 7 C. & P. 112,

(*o*) *Barwell v. Adkins*, 1 M. & Gr.

per Tindal, C.J.

807; 2 Sc. N. R. 11.

their admissibility was not affected by the lapse of time intervening between the writing of the respective letters : that the dates of the letters might affect the value, but not the admissibility of the evidence (*r*). CHAPTER XIII.

A letter addressed by the defendant to the plaintiff about the same period as that when the libel was published, and containing expressions similar to those in the libel complained of, is admissible in evidence to show *quo animo* the libel was published (*s*). So also evidence may be given that handbills, on the same subject as the libel, were circulated by the defendant about the same time ; and that one of them was carried backwards and forwards in front of plaintiff's door (*t*). Publications about same period as the libel are evidence of Malice.

Where the libel was contained in a letter printed and published in a newspaper, the manuscript copy of which—in the defendant's handwriting—was produced at the trial for the purpose of proving publication by the defendant ; and it appeared that the editor of the newspaper had drawn his pen through several passages which were of a more libellous tendency than the parts published in the newspaper, and did not in any degree qualify them : it was held, that the manuscript was receivable in evidence, the portions that corresponded with the printed libel to prove the publication by the defendant, and the obliterated matter to show *quo animo* the libel was published (*u*). But in an action of libel against the *publisher* of a magazine, evidence that the *editor* or *writer* (another person), was actuated by personal malice against the plaintiff, was ruled inadmissible (*x*). Obliterated portions of manuscript sent to newspaper.

(*r*) *Pearson v. Le Maitre*, 6 Scott, N. C. 607 ; 5 M. & Gr. 700. See also *Macleod v. Wakley*, 3 C. & P. 311 ; *Camfield v. Bird*, 3 Car. & Kir. 56 ; *Pearce v. Ormsby*, 1 Moo. & Rob. 455 ; *Symmons v. Blake*, 1 Moo. & Rob. 477.

(*s*) *Tarpley v. Blaby*, 2 Scott, 642.

(*t*) *Bond v. Douglas*, 7 Car. & P. 626, per Lord Abinger, C.B.

(*u*) *Tarpley v. Blaby*, 2 Sc. 642.

(*x*) *Robertson v. Wyldæ*, 2 Moo. & Rob. 101, per Tindal, C.J.

CHAPTER XIV.

SPECIAL DAMAGE : AND EVIDENCE THEREOF.

Damage by inference of law.

Actionable damage.

Special Damage must be the direct consequence of the Slander.

Evidence of Loss of Custom and Profits.

Damage, when too remote.

Subsequent Publications and Repetitions.

Measure of Damages.

Evidence of extent of Circulation of the Libel.

Payment into Court, effect of.

CHAPTER XIV. THE consequence of actionable slander must be to occasion some injury to the plaintiff, either in law or in fact. When the *immediate tendency* of the slander is to produce damage to the individual of whom it was spoken, it is actionable, though no actual damage has in fact resulted : damage by inference of law having arisen ; as in the case of libel ; which the law considers to be so deliberately mischievous in tendency, and injurious in consequences, as to confer a substantive right of action although no specific loss or damage can be proved : and so also in the case of slander where the words affect the plaintiff in his office, profession, trade, or business ; or where they impute to the plaintiff the commission of an indictable offence.

Damage by inference of law.

As to what in legal contemplation amounts to actionable damage.

Actionable damage, is such as affects either rights already acquired, or prevents the acquisition of some further benefit or advantage. Where the plaintiff has been wrongfully charged with the commission of some indictable offence, if the imputation rests as a bare charge, not officially made in the usual course of a criminal proceeding, the accused has a right to consider as special damage, the expense and labour to which he is put for the purpose of manifesting his innocence. As in a case where the plaintiff, in consequence of an insinuation that he was guilty of murder, was obliged to have an inquest taken on the body of the deceased (a).

Hindrance from succession to preferment.

In general where the plaintiff is hindered by the mere wrongful act of the defendant, from succeeding to any preferment, benefit, or advantage ; he may maintain an action for the special damage. As if a patron intend to present a divine to a benefice, and the defendant say of him "He is a heretic" ;

(a) *Peake v. Oldham*, Cowp. 277 ; per Lord Mansfield, C.J.

or a "bastard"; for which reason the patron refuses to present him and he thereby loses preferment, an action is maintainable (b). CHAPTER XIV.

And where the defendant represented to a third party, that he had a lien on certain goods then in the possession of such third party, and that the plaintiff was in embarrassed circumstances, and thereby prevented the delivery of the goods to the plaintiff; it was held, on demurrer, that the declaration disclosed a good cause of action (c). Hindrance and delay in business.

In an action by a surgeon and accoucheur for slander imputing to him, in words spoken to D., that a female servant had a child by him; whereby (as special damage) D. would not employ him as an accoucheur to attend his wife: it was held, that the plaintiff's damages were not limited to the mere loss of the fee for attending D.'s wife in her confinement; that the jury might give damages in respect of the loss of business arising directly from the slander spoken by the defendant to D.; but that he was not entitled to such general damages as might be supposed to have arisen from repetitions of the slander by other persons (d). Loss of Office, business or employment.

The loss of particular customers by a tradesman in consequence of slander, is an actionable special damage (e). To publish of a trader any statement, whether a slander or not, the natural tendency and consequence of which is to deter customers from dealing with him, is actionable, if followed by special damage; such as a general loss of custom (f). Loss of Custom in Trade.

In an action for the publication in a newspaper of a malicious falsehood concerning the plaintiff's business; the words published were not actionable *per se*, nor were they defamatory of the plaintiff, but they were such as had a tendency to injure him in his business; it was held, that evidence of a general loss of business if shown to have been the direct and natural consequence of the publication of the falsehood alleged, was admissible in support of the action (g). General loss of business.

And in an action for slander of the plaintiff as an innkeeper, proof of a general loss of custom is sufficient to sustain the

(b) *Sir J. Tasburgh v. Day*, Cro. 831; Bul. N. P. 7; 1 Lev. 140; *Bateman and wife v. Lyall and wife*, 7 C. B. (N. S.) 638.

(c) *Green v. Button*, 2 C. M. & R. 707. (f) *Riding v. Smith*, 1 Ex. D. 91;

(d) *Dixon v. Smith*, 5 H. & N. 451; 45 L. J. 281, per Kelly, L.C.B. (g) *Ratcliffe v. Evans* (1892), 2

29 L. J. Ex. 125. Q. B. 524; 61 L. J. 535.

(e) *Barron v. Gibbons*, Lord Ray,

CHAPTER XIV.

Diminution in number of worshippers at a Chapel.

action, without naming particular customers (*h*). But in an action by a dissenting minister for slander of him in his office as such, a diminution in the number of worshippers at the chapel where he officiates, is not alone sufficient evidence of special damage; there being no evidence that the plaintiff lost any emolument thereby (*i*).

Loss of character from imputations of unchastity, or adultery.

Prior to the "Slander of Women Act, 1891," words imputing unchastity to a woman, whether married or single, were not actionable unless some specific damage could be proved; or unless the imputation was published in writing (*k*): the suffering party, whose peace of mind had been destroyed, or whose prospects had been ruined, had, in such cases, no remedy (*l*). But now it is enacted, that words spoken and published, after the passing of that Act, which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable (*m*).

Loss of marriage.

Loss of marriage seems always to have been considered a temporal damage (*n*). In *Matthews v. Crass* (*o*), which was an action for words occasioning loss of marriage; after verdict for the plaintiff, it was urged, on motion in arrest of judgment, that this was the first case where loss of marriage was ever laid for words spoken of a man, and therefore was not warranted by *Ann Davis's* case (*p*). But the court conceived it to be immaterial, in case of loss of marriage, whether the plaintiff be a man or a woman.

Loss of the hospitality of friends.

Prior to the statute of 1891 (*supra*), the judges from time to time, frequently expressed regret at the state of the law whereby verbal imputations of unchastity upon women were not actionable without proof of special damage (*q*). In many cases,

(*h*) *Ecans v. Harries*, 1 H. & N. 254; 26 L. J. Ex. 31. See also *Rose v. Groves*, 5 M. & Gr. 613.

(*i*) *Hopwood v. Thorn*, 19 L. J. C. P. 94; 8 C. B. 293.

(*k*) *Knight v. Gibbs*, 1 A. & E. 43; 3 Nev. & Man. 469; *Wilby v. Elston*, 8 C. B. 142; 18 L. J. C. P. 320; *Roberts and u.r. v. Roberts*, 33 L. J. Q. B. 249; 5 B. & S. 384.

(*l*) Formerly proceedings might be instituted in the Ecclesiastical Courts, which had the power to punish offenders for this species of defamation; the jurisdiction, however, of those courts in suits for defamation was taken away by statute, in England, by 18 & 19 Vict. c. 41; and, in

Ireland, by 23 & 24 Vict. c. 32.

(*m*) 54 & 55 Vict. c. 51.

(*n*) *Davis v. Gardiner*, 4 Co. 16; Poph. 36; 1 Roll. Rep. 34, 35, 109; Mo. 409; Cro. Car. 155; case of Sir C. Gerald's bailiff; Bull N. P. 7; Vin. Abr. Ac. on Case for Words (D. a).

(*o*) Cro. Jac. 323.

(*p*) 4 Co. 16.

(*q*) *Greaves v. Blanchet*, Salk. 695; 6 Mod. 148; 12 Mod. 106; 8 Will. 3; *Wilby v. Elston*, 8 C. B. 142; 18 L. J. C. P. 320; *Knight v. Gibbs*, 1 A. & E. 43; 3 Nev. & Man. 469; *Lynch v. Knight and wife*, 9 H. L. 593; *Roberts and wife v. Roberts*, 33 L. J. Q. B. 250; 5 B. & S. 384.

however, they manifested a desire to administer every relief in their power to plaintiffs of this description, so that the most trifling loss sustained in consequence of such slander, as of a dinner or other hospitable but gratuitous entertainment (*r*) was held sufficient special damage to entitle the party to her action (*s*). CHAPTER XIV.

A mere apprehension of ill consequences cannot constitute a special damage; so that it has been held to be insufficient for the plaintiff to allege, that in consequence of the words, discord happened between him and his wife, and he was *in danger* of a divorce (*t*). Or, to say he lost the affection of his mother, who intended him £100 (*u*). But in an action for libelling a copartnership; Cresswell, J., ruled that the jury might take into consideration in estimating the damages to which the plaintiffs were entitled, the prospective injury which might accrue to the partnership from the defendant's act (*x*). Prospective or anticipated injury.

As to how the special damage must be connected with the slander in order to constitute a ground of action. Where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved (*y*). Special Damage must be connected with the slander;

The rule appears to be, that *the damage must be the natural, and direct or reasonable consequence of the wrongful act.* So, where the defendant asserted that the plaintiff had cut his master's cordage; upon which the master discharged him, though he was under an engagement to employ him for a term. It was held, that the discharge was not a ground of action; that the special damage must be the natural and legal consequence of the words spoken (*z*). and be the natural and direct consequence of the wrongful act;

The damage must be attributable *wholly* to the words; and so where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he was in law bound to perform, no action and wholly attributable to the words.

(*r*) *Moore v. Meagher* (in Error), 1 Taunt. 39.

(*s*) *Davies and wife v. Solomon*, 41 L. J. Q. B. 10; 20 W. R. 167; *Hartley v. Herring*, 8 T. R. 130; *Allsop and wife v. Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315.

(*t*) 1 Roll. 34.

(*u*) Car. 1; 1 Com. Dig. tit. Defam. D. 30.

(*x*) *Gregory and another v. Williams*, 1 Car. & Kir. 568. And see *Ingram v. Lawson*, 6 Bing. N. C. 212.

(*y*) *Vide Ratcliffe v. Evans* (1892), 2 Q. B. 532.

(*z*) *Vicars v. Wilcocks*, 8 East, 1.

CHAPTER XIV. is maintainable; for the plaintiff, in such case, is entitled to a compensation for the non-performance of the contract; and were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury; first, against the author of the slander; and secondly, against the person who had refused to perform his agreement (a). It has, however, been ruled, that the wrongful refusal of a third party to fulfil a contract, may give a right to special damage for a slander, if such refusal be the probable consequence of the utterance of the slander (b).

Loss of
Membership
of a Club.

Where the plaintiff was a candidate for election to a London club; and upon a ballot of the members was not elected: a meeting was afterwards called to consider a proposed alteration of the rules as to the election of members: the defendant said of the plaintiff that "his conduct was so bad at a club in Australia that a round robin was signed urging the committee to expel him." In an action of slander, alleging that the defendant thereby "induced, or contributed to induce, a majority of the members of the London club to retain the regulations under which the plaintiff had been rejected, and thereby prevented him from again seeking to be elected to the club": it was held, on demurrer, that the claim disclosed no cause of action; for the words were not actionable in themselves, and the allegation of damage was too remote and was not the natural or probable consequence of the words spoken (c). And Bowen, L.J., in the course of his judgment, observed:—"I do not say that if the defendant, by speaking the words complained of, had actually prevented the election of the plaintiff, the latter might not have had a cause of action. Possibly the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognizance" (d). If the damage alleged be not the natural consequence of the words spoken, it will be too remote to support the action (e).

Plaintiff cannot
twice recover
damages for
same words.

The plaintiff having once recovered damages in an action for words, cannot afterwards recover an ulterior compensation for any loss subsequently resulting from the same words (f). Where the plaintiff, knowing the defendant's sentiments,

(a) *Morris v. Langdale*, 2 Bos. & 407; 52 L. J. 277.
Pul. 284.

(d) *Ibid.*, 11 Q. B. D. 415.

(b) *Société Française des Asphaltes v. Farrell*, 1 Cab. & El. 563, per Huddleston, B.

(e) *Speake v. Hughes* (1904), 1 K. B. 138.

(f) Bull. N. P. 7.

(c) *Chamberlain v. Boyd*, 11 Q. B. D.

procures the publication of that from which damage results, CHAPTER XIV. he will not afterwards be at liberty to ascribe his loss to the defendant's act, but be considered as the voluntary author of the mischief which follows (g).

A company's report containing imputations on the plaintiff, When nominal damages should be given. as manager, was issued to the shareholders: the defendants afterwards published it in a newspaper; it was ruled by Wightman, J., that although privileged as regards the shareholders, it was not so in respect of the publication in a newspaper: yet if the latter publication was made *bonâ fide*, and without malice, the jury would be justified in giving merely nominal damages (h).

In consolidated actions, under the Law of Libel Amendment Act, 1888 (i), the jury are required to assess the whole amount of the damages (if any) in one sum, but a separate verdict must be taken for, or against, each defendant, in the same way as if the actions consolidated had been tried separately; and if the jury find a verdict against the defendant or defendants in more than one of the actions so consolidated, they must apportion the amount of damages which they have so found between and against the said last-mentioned defendants. Consolidated actions, apportionment of damages.

Evidence of Special Damage.—Where special damage is essential to the action, the plaintiff must prove it according to the allegations in his Statement of Claim (k). It must be shown that the damage alleged and proposed to be proved, was the natural and immediate consequence of the slander (l). The general rule is, that no evidence of special damage is admissible, unless it be averred in the pleadings. The Special Damage must be the direct consequence of the Slander.

Where the words are in themselves actionable, no proof of special damage is necessary (m), although such be alleged. But the plaintiff cannot in that case, any more than where the special damage is the gist of the action, give evidence of any consequential damage, which is not alleged in the claim (n). And where special damage is alleged in the Claim, it must be proved as laid (o). Where the words are actionable per se.

- (g) 3 B. & P. 592; 5 Esp. R. 15.
 (h) *Davis v. Cutbush and others*, 1 F. & F. 487.
 (i) 51 & 52 Vict. c. 64, s. 5.
 (k) *Ward v. Weeks*, 7 Bing. 211;
Sterry v. Foreman, 2 C. & P. 592.
 (l) *Knight v. Gibbs*, 1 A. & E. 43;

- Haddon v. Lott*, 15 C. B. 411.
 (m) *Ingram v. Lawson*, 6 Bing. N. C. 212; *Tripp v. Thomas*, 3 B. & C. 427.
 (n) *Geare v. Britton*, B. N. P. 7.
 (o) *Hopwood v. Thorn*, 8 C. B. 293;
 19 L. J. C. P. 94.

CHAPTER XIV. It is always necessary to show in what manner the plaintiff's character could suffer from an alleged libellous imputation. So in the case of a Roman Catholic priest accused of imposing cruel penance on a Roman Catholic subject, it must be shown what course it was competent for the priest to pursue in imposing penance; and how the enjoining of the alleged *cruel* penance would affect the character of a Roman Catholic priest (*p*).

The Damage need not be the *necessary* consequence. The law does not require that the special damage resulting from a slander, should be the *necessary* consequence arising from the utterance of the words; it is sufficient if it be the direct, natural or probable consequence or effect (*q*).

Evidence of *special* loss of Custom; The loss of a customer is special damage, although, if the dealing had taken place with such customer it would have been a losing transaction (*r*).

of *general* loss of Custom or Trade. In an action of slander, alleging that the plaintiff in consequence of the slander, lost his customers; it was formerly the rule that he could not give in evidence the loss of any whose names were not specified in the declaration (*s*). That doctrine has however been virtually overruled; and it has been held in recent cases, that in an action for slander of the plaintiff in his trade or business, it is sufficient to allege and prove as special damage resulting from the slander, a general loss of custom, without specifying the names of the customers who ceased to trade or do business with him (*t*).

Evidence as to Profits and extent of Business. In estimating the damage for a libel published of a man in the way of his business, the jury must have some evidence as to the nature and extent of the business carried on by the plaintiff; for the same amount of damages ought not to be given in a case where the plaintiff's business is small, as where it is large (*u*).

Damage: when too remote. Where the defendant libelled a performer at a place of public entertainment, in consequence of which, from the fear of being hissed, she refused to sing; and the plaintiff (the proprietor) alleged as special damage, that his oratorios had in

(*p*) *Hearne v. Stowell*, 12 A. & E. 719.

(*q*) *Lynch v. Knight and wife*, 9 H. & L. 591 and 595.

(*r*) *Storey v. Challands*, 8 C. & P. 234, per Lord Denman, C.J.; and see *Bateman and wife v. Lyall and wife*, 7 C. B. (N. S.) 638.

(*s*) *Hartley v. Herring*, 8 T. R. 130.

(*t*) *Erans v. Harries*, 1 H. & N. 251; 26 L. J. Ex. 31; *Dixon v. Smith*, 5 H. & N. 451; 29 L. J. Ex. 125; *Riding v. Smith*, 1 Ex. D. 91; 45 L. J. 281; *Ratcliffe v. Evans* (1892), 2 Q. B. 524; 61 L. J. 535.

(*u*) *Ingram v. Lawson*, 6 Bing. N. C. 212.

consequence been more thinly attended; it was ruled that the injury was too remote, and that it did not appear but that the refusal to perform arose from some groundless apprehension, or from caprice or indolence (*x*). CHAPTER XIV.

Where the action was for slander spoken of the defendant on the Royal Exchange, in his business of a captain in the merchant service; and it was alleged, that by reason of the slander, divers persons (naming them) "who would otherwise have retained and employed the plaintiff declined and refused to do so"; the evidence showed that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation. It was objected that the special damage was not proved as laid; that the persons alluded to did not *refuse* to employ; that it was true they did not employ, but that was not on account of the slander, but on the ground of the non-recommendation; and Best, C.J., allowed the objection (*y*).

Upon principle, the *spirit and intention* of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff; and evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action (*z*). Evidence of the spirit and intention of the defamer.

Therefore either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter. But if the evidence given for that purpose establish another cause of action, the jury should be cautioned against giving any damages in respect of it. And, if such evidence be offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected (*a*). But it will be no misdirection if the judge omit telling the jury not to give damages in respect of a publication subsequent to the libel (*b*). Evidence of subsequent publications.

In an action of slander, the plaintiff in showing special damage must confine his proofs to the evidence of persons who heard the defendant speak the words (*c*). For repetitions by and repetitions.

(*x*) *Ashley v. Harrison*, 1 Esp. C. 48, per Lord Kenyon, C.J.

(*y*) *Sterry v. Foreman*, 2 C. & P. 592; see also *Hoey v. Felton*, 11 C. B. (N. S.) 142; 31 L. J. C. P. 105.

(*z*) *Pearson v. Le Maitre*, 5 M. & G. 720.

(*a*) *Ibid.* 5 M. & G. 700; 6 Scott, N. R. 607.

(*b*) *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 228; *Goslin v. Curry*, 7 M. & G. 342; 8 Scott, N. R. 21.

(*c*) *Rutherford v. Evans*, 4 C. & P. 74.

CHAPTER XIV. a third party who heard the defendant speak them, the defendant is not liable (*d*).

Measure of damages.

In the case of libel there is no measure that can be called a legal measure as to the damages: the jury have to consider the conduct of the parties (*e*); and are entitled to look at the whole conduct of the defendant, from the time of the publication of the libel down to the time of giving their verdict. They may consider what his conduct has been before action, after action, and in Court during the trial (*f*).

Jury may take defendant's conduct into consideration.

Aggravation of damages by plea of justification.

The jury may take into consideration the nature of the imputation, how it has been made, and how persisted in down to the time of the verdict. The defendant's conduct, in putting a justification on the record which he does not attempt to prove and will not abandon, may be considered as evidence of malice and an aggravation of the injury (*g*). And where the defendant, at the trial, abandoned his plea of justification and apologized for it; it was held, that the apology and abandonment came too late; and that the jury might, in estimating the damages, consider the fact of the defendant persisting in the truth of his imputation by putting such a plea on the record, and only abandoning it at the last moment (*h*).

By cross-examination of Plaintiff.

And where counsel for the defendant, in an action of libel, cross-examined the plaintiff with a view of showing that he had been guilty of the crime of which he had been acquitted, Cockburn, L.C.J., directed the jury that such was an aggravation of the libel; and that the damages must follow the aggravation (*i*).

Extent of circulation of the Libel may be proved.

Where the libel complained of is published in a newspaper, evidence may be given to show the extent of the circulation of the newspaper, and consequent injury to the plaintiff; by proving that copies of it, containing the libel, have been gratuitously circulated in the neighbourhood in which the plaintiff resides; though it be not shown that such copies were sent by the defendant, the publisher (*k*). And in

(*d*) *Ward v. Weeks*, 7 Bing. 211; 4 M. & P. 796; *Tunnicliffe v. Moss*, 3 C. & Kir. 83; *Dixon v. Smith*, 5 H. & N. 451; 29 L. J. Ex. 125; *Clarke v. Morgan*, 38 L. T. 354.

(*e*) Per Lord Russell, L.C.J., in *The British Empire, &c. Co. v. Linotype Co., Ltd.*, 14 T. L. R. 255.

(*f*) *Praed v. Graham*, 24 Q. B. D.

53, 55; 59 L. J. 230.

(*g*) *Simpson v. Robinson*, 12 Q. B. 513.

(*h*) *Warwick v. Foulkes*, 12 M. & W. 507.

(*i*) *Risk Allah Bey v. Whitehurst and another*, 18 L. T. (N. S.) 615.

(*k*) *Gathercole v. Miall*, 15 M. & W. 319.

directing the jury as to damages, it is not necessary to caution them as to the injury sustained by telling them to take into consideration the fact that one publication only has been proved; and that, a mere sale of the libel to the plaintiff's agent (*l*). CHAPTER XIV.

Under the Libel Act, 1843 (6 & 7 Vict. cap. 96, sec. 2), damages might formerly, under certain conditions therein stated, be paid into court. But it was held that, where the plea under that section was not proved at the trial, the damages should be assessed wholly irrespective of the amount paid into court (*m*), and without considering that payment in any way as an admission of liability (*n*). So much of the section, however, as related to the payment into court, is now repealed: consequently those cases are no longer law. A defendant by paying money into court in actions of slander and libel, now admits the claim, or cause of action, in respect of which the payment is made. And he cannot, with a payment into court, plead a justification to the same libel, nor a defence denying liability (*o*). But where a defendant pleaded a statutory defence under the Libel Act, 1843, s. 2, to the effect that the libel was published without actual malice and without gross negligence, an apology and payment into court of £5; and the jury found that the libel was published without actual malice but not without gross negligence, and that the apology was sufficient; and they assessed the damages at £5: it was held, that the defendants were not entitled to avail themselves of the payment into court, and that the plaintiff was entitled to judgment (*p*). Payment into court, effect of.

Where, in an action of libel, the defendant paid money into court in satisfaction; and without denying liability: the plaintiff proceeded with the action, but did not take the money out of court. Meanwhile the defendant died: it was held that the defendant's executors were not entitled to have the money paid out to them; but that the plaintiff was entitled to it (*q*). Payment into court without denying liability.

Where there is more than one libel alleged in the statement of claim, or where the libels are divisible, the defendant is at liberty to plead justification to one or more of the charges, and as to the other or others, may pay money into court; but Payment in, where several, or divisible libels.

(*l*) *Duke of Brunswick v. Harmer*, 14 Q. B. 189.

(*m*) *Lafone v. Smith*, 4 H. & N. 158.

(*n*) *Jones v. Mackie*, L. R. 3 Ex. 1; 37 L. J. Ex. 1.

(*o*) R. S. C., Ord. XXII. r. 1.

(*p*) *Oxley v. Wilkes and others*, C. A., (1898) 2 Q. B. 56.

(*q*) *Brown v. Feeney*, 1 K. B., (1906) C. A. 563.

CHAPTER XIV. with regard to the payment into court, he must distinctly specify as to which of the charges alleged in the statement of claim the payment into court is made; otherwise the whole defence will be struck out as embarrassing (*r*).

Where money paid into Court, and jury find verdict for a farthing only.

Where the action was for damages in respect of *three* libels published in a newspaper; as to *two* of which the defendants justified; but as to the third, they pleaded an apology under the Libel Act, 1843 (6 & 7 Vict. cap. 96, sec. 2), and payment into court, under 8 & 9 Vict. cap. 75, sec. 2, of £50 by way of amends: at the trial the jury found a verdict for the plaintiff on all the libels, with one farthing damages in respect of each. Upon this verdict, both plaintiff and defendant having claimed the £50, Wills, J., reserved the case for further consideration, when he held, that notwithstanding the verdict for one farthing only, the plaintiff was entitled to an order for the payment out to him of the £50; and that Ord. XXII. r. 22, did not operate so as to deprive the plaintiff of his right to the money paid into court (*s*). But in a subsequent case (an action of slander) in which the defendant paid £5 into court under the R. S. C. (*supra*), the jury having found a verdict for the plaintiff, with a farthing damages; the judge ordered (*t*) the money paid into court, less one farthing, to be paid out to the defendant: and the Court of Appeal upheld the order (*u*).

Damages on judgment by default.

Where the defendant has suffered judgment by default, it is not incumbent on the plaintiff to adduce any evidence, on the execution of the writ of inquiry, to assess the damages; and the jury, in the absence of evidence of damage, are not confined to nominal damages (*x*).

(*r*) *Fleming v. Dollar*, 23 Q. B. D. 342; 58 L. J. 548; and *vide* Ord. XXII. r. 2; and *Davis v. Billing*, 8 T. L. R. 58.

(*s*) *Dunn v. The Devon and Exeter, &c. Newspaper Co.*, 63 L. J. Q. B.

342; (1895) 1 Q. B. 211 (n.).

(*t*) Ord. XXII. r. 5.

(*u*) *Gray v. Bartholomew*, (1895) 1 Q. B. 209; 64 L. J. 125.

(*x*) *Tripp v. Thomas*, 3 B. & C. 427.

CHAPTER XV.

PLEADINGS AND PROCEDURE IN ACTIONS OF SLANDER
AND LIBEL.

PART I.—PLAINTIFF'S PLEADINGS.

<i>Indorsement on Writ.</i>	<i>Prefatory averments.</i>
<i>Venue: and grounds for changing.</i>	<i>Statement of the defamatory matter.</i>
<i>Parties:</i>	<i>Particulars of matters alleged in</i>
" <i>Joint and separate actions.</i>	<i>Claim or Defence.</i>
" <i>Partners, Corporations, &c.</i>	<i>Innuendo: nature and office of.</i>
" <i>Husband and wife.</i>	<i>Averment of Special Damage.</i>
" <i>Infants (Plaintiffs and De-</i>	
<i>fendants).</i>	

THE pleadings and procedure in actions of slander and libel are, with few exceptions, to be noted hereafter, the same as in other actions of tort. They are regulated by the "Rules of the Supreme Court," made in pursuance of the authority contained in the Judicature Acts.

CHAPTER XV
Part I.
Pleadings and
procedure in
actions of
slander and
libel.

Although the rules of pleading have been altered in many respects by the Judicature Acts, the law which gave rise to the former mode of pleading remains the same notwithstanding (a). It has therefore been deemed advisable to retain in the text many of the decisions upon various points relating to the pleadings in actions of slander and libel, under the former system of procedure.

In actions for libel the indorsement on the writ must state sufficient particulars to identify the publications in respect of which the action is brought (b).

Indorsement
on writ.

It is provided by the R. S. C., 1883 (c), that there shall be no local *venue* for the trial of any action, except where otherwise provided by statute, but in every action in every Division the place of trial shall be fixed by the court or a judge (d).

Venue.

Under the former procedure the *venue* in actions for slander and libel was transitory, and might therefore be laid in any

(a) *Vide The Capital and Counties Bank v. Henty*, 7 App. Cas. 772; 52 L. J. Q. B. D. 249.

(b) Ord. III. r. 9.

(c) Ord. XXXVI. r. 1.

(d) R. S. C., July, 1902.

CHAPTER XV.
Part I.Application to
change *venue*.

county, at the option of the plaintiff; but usually in the county in which the cause of action arose. It might then, as now, however, be changed by the consent of the parties, or by order made on application by the defendant to the court or a judge at chambers, supported by an affidavit. But no *venue* can be changed without an order of the court or a judge, unless by consent of the parties. Where the cause of action does not arise in the county in which the *venue* is laid, and the defendant seeks to change the *venue* to the county in which it arose, it may sometimes be changed on application to a judge at chambers, supported by what is called the "common affidavit" (*e*). But the application must usually be made before issue joined. If not made till after issue joined, some further or additional reason in support of the application will be required (*f*): so also if the defendant is under short notice of trial (*g*), or under terms to take notice of trial for a particular sitting (*h*). When the common affidavit is answered by the plaintiff on special grounds, it depends on the particular circumstances and balance of convenience, as to whether an order to change the *venue* will be made (*i*). Where the application is founded upon the common affidavit of the cause of action arising in a certain county and not elsewhere, it may be made before defence pleaded. But where the application is to change the *venue* on special grounds, it is usually made after defence pleaded; because, until then, it cannot be known what issue is to be tried (*k*).

Grounds for
changing
venue.

Although witnesses residing in the county in which the libel was received, are intended to be called in mitigation of damages, no justification being pleaded, the *venue* will not be changed on application by the defendant, notwithstanding that the plaintiff has no witnesses in the county in which he has laid the *venue* (*l*). In an action for slander imputing perjury to the plaintiff, before a committee of the House of Commons, the *venue* was laid in London; the defendant had it changed to the county of Kent on the usual affidavit; but the court, upon affidavits showing that a newspaper, which circulated generally in the county of Kent, had made comments

- (*e*) *De Rothschild v. Shilton*, 8 Ex. 221.
 503; 22 L. J. Ex. 279; *Smith v. O'Brien*, 26 L. J. Ex. 30; *Clulee v. Bradley*, 13 C. B. 604. (i) *Ross and another v. Napier*, 30 L. J. Ex. 2.
 (*k*) *Hodge v. Churchward*, 5 C. B. 495.
 (*f*) *Begg v. Forbes*, 13 C. B. 614.
 (*g*) *Clulee v. Bradley*, 13 C. B. 604. (l) *Wheatcroft v. Mousley*, 11 C. B. 677.
 (*h*) *Jackson v. Kidd*, 29 L. J. C. P.

upon the subject-matter of the action, accompanied by CHAPTER XV.
ludicrous animadversions upon the plaintiff, ordered the *venue* Part I.
to be brought back, upon terms as to costs (*m*). But it has
been held to be no ground for changing the *venue* in an action
for a libel contained in a local newspaper, that the defendant,
the proprietor, possesses much influence in the county in
which the *venue* is laid, and had since the commencement of
the action evinced a disposition to exercise it to the prejudice
of the plaintiff (*n*). But the court intimated, in that case,
that they would interfere if the defendant should, before the
trial, publish anything in relation to the matter of the action
reflecting upon the plaintiff.

All persons may be joined in one action as plaintiffs, in Parties.
whom any right to relief in respect of or arising out of the
same transaction or series of transactions is alleged to exist,
whether jointly, severally, or in the alternative where if such
persons brought separate actions any common question of law
or fact would arise; provided that, if upon the application of
any defendant it shall appear that such joinder may embarrass
or delay the trial of the action, the court or a judge may order
separate trials or make such other order as may be expedient.
And judgment may be given for such one or more of the
plaintiffs as may be found to be entitled to relief, for such
relief as he or they may be entitled to, without any amend-
ment. But the defendant, though unsuccessful, shall be
entitled to his costs occasioned by so joining any person who
shall not be found entitled to relief, unless the court or a
judge in disposing of the costs shall otherwise direct (*o*).

In the case of a libel published in a newspaper, the pro-Proprietor,
prietary, as well as the publisher, editor, and others concerned publisher, and
in the printing and publishing of the libel, are each individu- editor, of news-
ally liable, and may be sued in separate actions. And, under paper, may be
the rules above mentioned, they may be sued either jointly or sued for libel.
severally: if jointly, the damages should be separately assessed:
and it matters not that other persons may be liable for the
same libel. So also, the author of the libel may be sued, not-
withstanding that the publisher and others have been sued in
separate actions. But where several actions are brought in
respect of the same libel, they may, on the application of the
defendants to a judge at chambers, be consolidated, so that

(*m*) *Pybus v. Scudamore*, Arnold's (N. S.) 571.
Rep. C. P. 464.

(*o*) Ord. XVI. r. 1, as amended by
(*n*) *Walker v. Brogden*, 17 C. B. R. S. C., Oct. 26th, 1896.

CHAPTER XV. they may be tried together, and the damages, after being
 Part I. assessed in one sum, must then be apportioned by the
 jury (*p*). If co-proprietors of a newspaper or other property
 or business, are jointly libelled, and the injury is joint, then
 the action should be joint (*q*).

Misjoinder, or
 nonjoinder, of
 parties. Under the R. S. C., no action shall be defeated by reason
 of the misjoinder of parties. And the court or a judge may,
 at any stage of the proceedings, order that the names of any
 parties improperly joined, whether as plaintiffs or as defend-
 ants, be struck out; and that the names of any parties,
 whether plaintiffs or defendants, who ought to have been
 joined, or whose presence before the court may be necessary,
 in order to enable the court, effectually and completely, to
 adjudicate upon and settle all the questions involved in the
 action, be added (*r*).

Misjoinder of
 plaintiffs. Where two plaintiffs (a mother and daughter) were joined
 in an action of slander against the defendants (husband and
 wife); by the statement of claim it appeared that several
 distinct slanders were alleged, some of one plaintiff and some
 of the other; it was held, that these being separate actions
 the plaintiffs were improperly joined; that they must elect
 which plaintiff would proceed; and that so much of the state-
 ment of claim as related to the other plaintiff must be struck
 out (*s*).

In an action of libel against the publisher of a newspaper,
 it appearing (after issue joined) in answer to interrogatories,
 that one M. G. was the sole proprietor of the newspaper; the
 court, on the application of the plaintiff, made an order that
 M. G. should be joined as defendant, subject to all rights to
 which he would have been entitled if joined in the first
 instance (*t*).

Partners in
 trade or
 business. Any two or more persons claiming or being liable as co-
 partners and carrying on business within the jurisdiction may
 sue or be sued in the name of the respective firms, if any, of
 which such persons were co-partners at the time of the accruing
 of the cause of action; and any party to an action may in such
 case apply by summons to a judge for a statement of the
 names and addresses of the persons who were, at the time of

(*p*) 51 & 52 Vict. c. 64, s. 5.

(*q*) *Russell and another v. Webster*,
 23 W. R. 59.

(*r*) R. S. C. 1883, Ord. XVI. r. 11.

(*s*) *Sandes and another v. Wildamith*

and another, (1893) 1 Q. B. 771; 62
 L. J. 404.

(*t*) *Edward v. Lowther*, 45 L. J.
 C. P. D. 417.

the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct (*u*). CHAPTER XV.
Part I.

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm (*x*). Demand by
defendant for
names, &c., of
partners of
plaintiff firm.

Corporations and companies, duly incorporated, may sue at common law in respect of libels by which their joint property or their trade is injured, or the value of their shares depreciated; and this, too, whether the libeller be a stranger, a member of the corporation, or a shareholder in the company (*y*). And so also for a slander upon them in the way of their business (*z*). But not for slander or libel merely affecting personal reputation (*a*). The chairman may sue for a libel on the company although it be not a corporate body: if, by act of parliament, actions, suits, &c., are authorised to be commenced in the name of the chairman for the time being (*b*). And a corporation aggregate is liable both civilly and criminally, in its corporate capacity, for the publication of a libel under such circumstances as would imply malice (*c*). Corporations
and Companies.

A railway company, being a corporation aggregate, may be sued for a libel published by order of the corporation; and it is not necessary, in such an action, to prove either express malice or an intention to injure (*d*). So also a Railway
company,
liability for
libel.

(*u*) Ord. XLVIII. r. 1; R. S. C., June, 1891.

(*x*) *Ibid.* r. 2.

(*y*) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 90; 28 L. J. Ex. 201.

(*z*) *Royal Aquarium, &c. Society, Ltd. v. Parkinson*, (1892) 1 Q. B. 431; 61 L. J. 409.

(*a*) *Manchester, Mayor, &c. v. Williams*, (1891) 1 Q. B. 94.

(*b*) *Williams v. Beaumont*, 10 Bing. 260.

(*c*) *Whitfield v. South E. R. Co.*, E. B. & E. 115; 27 L. J. Q. B. 229.

(*d*) *Whitfield v. South E. R. Co.*, *supra*.

CHAPTER XV. joint-stock company, limited, may be liable to an action for libel (*e*).
Part I.

Corporation,
Libel by
servant of.

And a corporation may be liable for the malicious act of their servant in publishing a libel (*f*).

Municipal
corporation
cannot sue for
libel merely
affecting
personal
reputation.

But where, in an action of libel brought by a municipal corporation against the proprietor of a newspaper, it was alleged that the defendant had published statements charging the city council with bribery and corruption; but the statement of claim contained no allegation that the property or pecuniary interests of the corporation had suffered any damage: the defendant in his defence objected, that the statement of claim disclosed no cause of action, and that a municipal corporation could not sue in its corporate capacity in respect of the alleged words in the sense complained of. It was held, that inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of the offences alleged, the statement of claim disclosed no cause of action; and that there was no principle upon which such an action could be founded (*g*).

Corporations
may sue for
libels affecting
their business.

A trading corporation or joint-stock company may maintain an action in respect of a libel calculated to injure them in their business; and this, too, without proof of special damage. But the words complained of must be such as to injuriously affect the corporation or company, as distinct from the individuals who compose it (*h*).

Public bodies
and others
entitled to
notice of
action.

Trustees appointed under certain acts of parliament are in general entitled to notice of action before any proceedings can be taken against them. But such notice must be strictly in accordance with the statute; it must not be a conditional notice: an attorney's letter demanding reparation and threatening an action unless certain terms and conditions were complied with, has been held to be no notice within the statute (*i*).

Married
woman may
sue and be
sued.

By the R. S. C. (*k*) married women may sue and be sued as provided by the Married Women's Property Act, 1882. And

(*e*) *Lawless v. The Anglo-Egyptian Cotton and Oil Co., Ltd.*, 10 B. & S. 226; L. R. 4 Q. B. 262; 38 L. J. Q. B. 129.

(*f*) *Citizens' Life Assurance Co. (App.) & Brown (Resp.)*, (1904) A. C. 423.

(*g*) *Manchester, Mayor, Aldermen and others v. Williams*, (1891) 1 Q. B. 94.

(*h*) *South Hetton Coal Co., Ltd. v. North Eastern News Association, Ltd.*, (1894) 1 Q. B. 133; 63 L. J. 293.

(*i*) *Norris v. Smith*, 10 A. & E. 188; *Royal Aquarium, &c. Society v. Parkinson*, (1892) 1 Q. B. 431; 61 L. J. 409; and see "The Public Authorities Protection Act, 1893," 56 & 57 Vict. c. 61.

(*k*) Ord. XVI. r. 16.

claims by or against husband and wife may be joined with claims by or against either of them separately (*l*). CHAPTER XV.
Part I.

By the Married Women's Property Act, 1882, a married woman is made capable of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding are to be her separate property; and any damages or costs recovered against her in any such action or proceeding are to be payable out of her separate property, and not otherwise (*m*).

Under this enactment a married woman may sue and be sued for slander or libel without the necessity (which formerly existed) of joining her husband as co-plaintiff, or as co-defendant. The Act does not, however, prohibit the joining of the husband in any such action. It is optional with the plaintiff either to sue the wife alone, or to join the husband: his former liability continues notwithstanding the statute. And it has been held that the husband may still be joined as a defendant in an action for a libel published by the wife during her coverture (*n*). But where an action of libel is brought against husband and wife jointly, for a libel published by the wife: if the wife pleads a denial of the publication, the husband will not be allowed to plead payment of money into court in satisfaction (*o*). When husband and wife should be joined in the action.

It appears that a wife may now sue her husband in a civil action for a libel upon her in her separate trade or business (*p*). But a wife could not before, and cannot since, the Married Women's Property Acts (1870, 1882, 1884), take criminal proceedings against her husband for a defamatory libel (*q*). Wife may sue husband for libel; but not by criminal proceeding.

A married woman who has obtained a "Protection Order" under the 20 & 21 Vict. cap. 85, s. 21, in consequence of desertion by her husband, might, even before the Married Women's Property Act, 1882, maintain an action for a libel, without joining her husband as a co-plaintiff. And it has Married woman who has obtained a Protection Order may sue for libel as a *feme sole*.

(*l*) Ord. XVIII. r. 4.

(1904) 1 K. B. 292.

(*m*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2.

(*p*) *Summers v. The City Bank*, L. R. 9 C. P. 583, per Brett, J.

(*n*) *Seroka v. Kattenburg and wife*, 34 W. R. 542; 17 Q. B. D. 177; 55 L. J. 375.

(*q*) *The Queen v. The Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. M. C. 118.

(*o*) *Beaumont v. Kaye and wife*,

CHAPTER XV. since been held that a married woman who has obtained such
 Part I. an order is in the same position as regards suing and being
 sued in the case of torts as she is in the case of contract; and
 that she might sue in an action for libel as if she were a *feme
 sole* (r).

Infants, plain- By the R. S. C. (s), infants may sue as plaintiffs by their
 tiffs, and next friends, in the manner heretofore practised in the
 defendants. Chancery Division, and may, in like manner, defend by their
 guardians appointed for that purpose.

An Alien may An alien friend, though domiciled abroad, may sue for
 sue. damages for a libel published of him in England (t).

Suits *in forma* Any person may be admitted in the manner heretofore
pauperis. accustomed, to sue or defend as a pauper, on proof that he is
 not worth £25, his wearing apparel and the subject-matter of
 the cause or matter only excepted (u).

Lunatic, liability of, for libel. A lunatic is liable to an action for publishing a libel: and
 so also to an indictment (x).

Prefatory averments. The use of a prefatory averment is, to afford foundation for
 subsequent innuendoes, explaining the meaning of the words
 used. Under the old practice (previous to the C. L. P. Act,
 1852), if the defamatory expressions complained of were
 actionable only when taken in connection with precedent facts
 it was necessary to allege those facts, by way of prefatory
 averment; and to show, by colloquium or innuendo, that the
 expressions complained of were used with reference to such
 facts, and that the construction and explanation of them by
 the plaintiff was thereby warranted. By this technical mode of
 pleading, difficulties sometimes arose, whereby a manifest in-
 justice was wrought between the parties; for, in some cases,
 although the jury found that the meaning as alleged by the
 plaintiff was intended by the defendant, yet in many instances
 judgment was arrested, for the reason only, that the *innuendo*
 had not been supported by the prefatory statements (y).

Provisions of C. L. P. Act as to prefatory averments. This technicality, so long a reproach to our system of
 procedure, was removed by the C. L. P. Act, 1852, sec. 61,
 by which it is enacted that—"In actions of libel and slander,
 the plaintiff shall be at liberty to aver that the words or

(r) *Ramden v. Brearley*, 44 L. J. Kelly, L.C.B., 39 L. J. Pro. & Mat.
 Q. B. 46; L. R. 10 Q. B. 147. 59.

(s) Ord. XVI. rr. 16, 18, 20 & 21. (y) *Vide Goldstein v. Foss*, 6 B. & C.

(t) *Pisani v. Lawson*, 6 Bing. N. C. 154; and same on Appeal in Ex. Cham.
 90. 4 Bing. 489; 2 Y. & J. 146; *Alexander*

(u) R. S. C. Ord. XVI. rr. 22-31. *v. Angle*, 1 C. & J. 143; *Gompertz v.*

(x) *Hale*, P. C. 14; and see per *Lery*, 9 A. & E. 282.

matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth with or without the alleged meaning, show a cause of action, the declaration shall be sufficient." It was held, that under this section, a colloquium was not necessary; that the plaintiff might set out the defamatory words, and put any construction he pleased upon them; and that it was then for the jury to say whether such construction was borne out by the evidence (z).

But the section above referred to did not make that actionable which was not so before; it altered the form of pleading, but not the law. It was always necessary (as it is now) that a cause of action should distinctly appear upon the face of the declaration (a). And so it was held, that where the words were not in themselves actionable, it was not sufficient to aver that they were used for the purpose of conveying some bad impression of the plaintiff; but that there must be a distinct averment that the words themselves bore a specific meaning which in itself was actionable (b).

An actionable meaning must be averred.

Where the words touch a man in his office or trade, but are not actionable in themselves, they must be connected with such office or trade either by specific averment or by implication (c); and such a requirement is still necessary. As in an action by a clergyman in holy orders for a slander charging him with incontinency, it must be shown on the face of the Statement of claim that he has sustained actual damage, or that he held, at the time of the slander, some office or employment producing temporal profit (d).

Averments as to Office, necessary, when?

Where the words have been spoken, or libel published, in a foreign language, they should be set out in such language (e); and it should be averred that the persons in whose presence they were spoken, understood the language (f).

Slander or Libel in Foreign Language.

(z) *Hemmings v. Gasson*, 27 L. J. Q. B. 252.

Schmaltz, 62 L. T. 121.

(a) Now termed "Statement of Claim."

(c) *Miller v. David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84.

(b) *Cox v. Cooper*, 12 W. R. 75; 9 L. T. N. S. 329, Q. B.; and see the observations of Lord Blackburn on this section, in a case in the House of Lords, 7 App. Cas. 782; 52 L. J. Q. B. D. 254; and see *Jacobs v.*

(d) *Gallwey v. Marshall*, 23 L. J. Ex. 78; 9 Ex. 294.

(e) *Zenobio v. Axtell*, 6 T. R. 162; 3 M. & S. 115; *Jenkins v. Phillips*, 9 C. & P. 766.

(f) *Amann v. Damm*, 8 C. B. (N. S.) 597; 29 L. J. C. P. 313.

CHAPTER XV.
Part I.Statement of
the defamatory
matter.The words
used must be
set out.

It has always been necessary that the defamatory matter complained of should be stated fully upon the record and not by way of recital (*g*). And the words alleged to be defamatory must be unequivocally so, and should be proved as laid.

The law requires the very words of the alleged slander, or libel, to be set out upon the record. It has frequently been held, that it is not sufficient to describe them by their sense or meaning, substance, purport, or effect (*h*). And this still remains the law, both in civil and criminal proceedings for libel (*i*) : the only exception being in the case of an obscene libel, as to which it has been enacted that the obscene passages need not be set out in any indictment or other judicial proceeding, but that it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel, with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, &c., in what part of the book or other document the alleged libel is to be found (*k*).

And therefore (with the exception above stated), notwithstanding that by the Rules of the Supreme Court, every pleading shall contain only a statement, in a summary form, of the material facts on which the party pleading relies (*l*), the precise words alleged to constitute the libel, or the slander, are "material facts," and must be set out in the Statement of claim (*m*).

Matter in
aggravation.

Where it was alleged in the Statement of claim, that the defendant published the alleged libel in a newspaper, knowing that it would be re-published in editions of the same paper published in France and elsewhere; it was held, that the allegation was properly made in the Statement of claim (*n*).

Slander by
words of
interrogation.

If the slander be contained in words of interrogation, it must be so laid, and should not be averred to have been spoken affirmatively (*o*).

Of two persons
at once.

Where A. says of B. and C. "You have committed such an

(*g*) *Brown v. Thurlow*, 4 Dow. & L. 301; 16 M. & W. 36; *Wright v. Clements*, 3 B. & Ald. 506; *Gutsale v. Mathers*, *infra*.

(*h*) *Solomon v. Lawson*, 8 Q. B. 823; *McPherson v. Daniels*, 10 B. & C. 274; *Wood v. Adam*, 6 Bing. 481; *R. v. Berry*, 4 T. R. 217; *Wood v. Brown*, *infra*.

(*i*) *Vide Bradlaugh v. The Queen*,

3 Q. B. D. 607; 48 L. J. M. C. 5.

(*k*) 51 & 52 Vict. c. 64, s. 7.

(*l*) See Ord. XIX. r. 4.

(*m*) *Harris v. Warre*, 4 C. P. D. 215; 48 L. J. 310.

(*n*) *Whitney and others v. Moignard*, 24 Q. B. D. 630.

(*o*) 2 East, 434; 8 T. R. 150; 4 T. R. 217.

offence," though B. and C. may have separate actions, each must state the words to have been spoken of both (*p*). CHAPTER XV.
Part I.

Where the words are spoken ironically, they must be stated as spoken, with an averment that they were spoken ironically (*q*). Ironical words.

Where the words are spoken in answer to a question, and the injurious meaning is to be collected not merely from the terms of the answer, but from the question and answer together, the words must not be laid as a substantive and affirmative proposition, but according to the fact (*r*). Slander in
reply to a
question.

Where the libel itself has been lost or destroyed, it will be a fatal variance if the libel declared on be materially qualified by evidence of words not contained in the declaration, although such words as qualified are libellous (*s*). Where libel
lost.

Formerly omissions and variances of a trifling nature between the words stated in the declaration and those proved on the trial were sufficient to defeat the plaintiff's action. But the powers of amendment given by modern statutes have enabled the judge, at the trial, to order the pleadings to be amended where the justice of the case requires it. Amendments
of variances
between words
laid and those
proved.

And by the R. S. C., the court or judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings. And the plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply. And a defendant may, without leave, amend his counter-claim. Other provisions are also made under this order as to amendments (*t*). Amendment
of pleadings.

Where there is a variance between the words laid and those proved at the trial, the proper time to apply for an amendment is at the conclusion of the plaintiff's case (*u*). Time to apply
for.

As to the application of the matter published. Where the expressions used are actionable, either in themselves, or by reason of consequential damage, without reference to any extrinsic circumstances, it is sufficient to show merely their application to the plaintiff. Under the old practice, this was effected by means of a colloquium, or some express averment, Colloquium or
application of
the defamatory
matter.

(*p*) Cro. Car. 512.

(*q*) 11 Mod. 86; *Boydell v. Jones*,
4 M. & W. 446.

(*r*) See *Bromage v. Prosser*, 4 B. &
C. 247; *Bell v. Byrne*, 13 East, 554;
10 B. & C. 274.

(*s*) *Rainy (App.) & Bravo (Resp.)*,

L. R. 4 P. C. 287; 20 W. R. 873; and
see *Cosgrave v. The Trade Auxiliary*
Co., 8 Ir. C. L. S. 349.

(*t*) See Ord. XXVIII.

(*u*) *Rainy (App.) & Bravo (Resp.)*,
L. R. 4 P. C. 287; 20 W. R. 873.

CHAPTER XV. that the words were spoken of and concerning the plaintiff,
 Part I. and an innuendo (in stating the words themselves) that he was the person meant. And if there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the court to judge whether the words, understood with reference to those circumstances, bore that more extended sense, or else those circumstances could not be looked at in favour of the plaintiff. Great nicety was required in setting out those circumstances; but the rule of pleading was altered in that respect by the C. L. P. Act, 1852, and the Judicature Act, 1873, and rules made thereunder; but the law which gave rise to the old mode of pleading has not been changed by those Acts (x). In a case previous to the C. L. P. Act, the declaration alleged that the defendant published, of and concerning the plaintiff, a libel, containing "the false and scandalous matter following," without alleging that the matter was "of and concerning the plaintiff," and then set out the alleged libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff, the count was held to be bad, on a writ of error brought (y). But under sec. 61 of the C. L. P. Act, 1852, it was rendered unnecessary in a declaration for libel or slander that there should be any colloquium: the plaintiff was at liberty to set out the words complained of, and put his own construction upon them: it was then for the jury to say whether such a construction was borne out by the evidence (z).

Colloquium rendered unnecessary by C. L. P. Act.

The general rule is, that where the party can show that he was intended by the defendant, he may maintain an action, whatever be the mode of description. But whenever the actionable quality of the publication arises from circumstances *extrinsic* of the words themselves, averments must still be used to show that such circumstances exist, and to connect the words with those circumstances.

Where the words are actionable upon the face of them.

Where the slanderous charge or imputation can be collected from the words themselves, it is unnecessary to make any averment as to circumstances, to the supposed existence of

(x) See per Lord Blackburn, 7 App. 563; *Bignell v. Buzzard*, 3 H. & N. Cas. 772; 52 L. J. Q. B. D. 249. 217; 27 L. J. Ex. 355.

(y) *Clement v. Fisher*, 7 B. & C. 459; *O'Brien v. Clement*, 4 D. & L. 563; *Hemmings v. Gasson*, 27 L. J. Q. B. 252; E. B. & E. 352.

which the words refer. For the slander, which is the ground of proceeding, appearing on the very face of the publication, it is a matter of indifference as to the cause of action, whether the circumstances referred to really existed, or were invented by the defendant: and such was the law even before the passing of the C. L. P. Act (a).

CHAPTER XV.
Part I.

Where the words are actionable with reference to the special character or occupation of the plaintiff, as a physician, barrister, clergyman, tradesman, &c., a prefatory averment of such his character and situation is, in some cases, still essential (b). And if the office or business of the plaintiff is not one of which the court can take judicial notice, still (unless it be an illegal calling), if it be shown that the defamatory words were spoken of the plaintiff with reference to that office or business, it will be sufficient (c).

Averments as to Office or Trade of Plaintiff.

By the R. S. C. (d), in all cases where a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, &c., are necessary, such may be ordered, upon such terms as to costs and otherwise, as may be just.

Particulars of matters alleged in claim or defence.

And accordingly, the plaintiff may be required, upon summons at chambers, to give particulars of the names of the persons to whom the alleged slander was uttered: and this even before delivery of the defence (e). And so also, in some cases, of the dates and places, or occasions, of the alleged uttering; for it may be that the words were spoken on a privileged occasion, in a privileged place, or to privileged persons.

Of names of persons to whom alleged slanders spoken.
Of places where, &c.

Where an order was made by a judge at chambers, upon a plaintiff in an action of slander, to deliver to the defendant an account in writing of the best particulars the plaintiff could give of the places where, and the persons present when, the slanders (the cause of action) were uttered, the same was affirmed on appeal (f).

(a) See *Button v. Heyward and wife*, 8 Mod. 24; Vent. 117; *Wakley v. Healey*, 7 C. B. 593; 18 L. J. C. P. 241; *Hughes v. Rees*, 4 M. & W. 204.

(b) *Gallwey v. Marshall*, 9 Ex. 300; 23 L. J. Ex. 78; and see *Ayre v. Craven*, 2 A. & E. 8; *James v. Brook*, 9 Q. B. 13.

(c) *Foulger v. Newcomb*, L. R. 2 Ex.

327; 36 L. J. Ex. 169.

(d) Ord. XIX. rr. 6 and 7.

(e) *Roselle v. Buchanan*, 16 Q. B. D. 656; *Early v. Smith*, 12 Ir. C. L. R. Appendix XXXV.

(f) *Williams v. Ramsdale*, 36 W. R. 125; *Roche v. Meyler*, (1895) 2 Q. B. (1r.) 35.

CHAPTER XV.
Part I.

Particulars of
slander spoken
at the insti-
gation of
another.

Particulars in
libel.

And where in an action of slander, it was alleged that one T., at the request and by the direction of the defendant, uttered the slander complained of; the plaintiff was ordered to give particulars of the names of the persons to whom, and of the place at which, such slander was uttered (*g*).

It should be observed that the rule stated in *Roselle v. Buchanan* (*supra*), as to a plaintiff being required to give particulars of the names of the persons to whom the alleged slander was uttered, is applicable to cases of slander only, and not to those of libel (*h*).

Particulars of
special damage.

Where special damage is the gist of the action, if the claim to such is made in general terms or not with sufficient particularity, the plaintiff may be required, under the R. S. C. (Ord. XIX. r. 4), to deliver particulars of the special damage alleged to have been sustained.

Particulars of
evidence in
mitigation of
damages.

In actions of libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence (*i*).

Innuendoes,
the nature and
office of.

Innuendoes.—An innuendo may be defined to be an averment which explains the meaning of the defendant's publication by reference to facts previously ascertained by averment or otherwise (*k*). An innuendo is necessary, where the language of the defendant is obscure, or apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation.

So that where matter charged as libellous does not upon the face of it appear to be so, it is the proper office of the innuendo to explain the meaning of the language used, and how it becomes libellous (*l*). And where the libellous matter charged does not on the face of it appear to relate to the plaintiff, although previously averred to be published "of and

(*g*) *Bradbury v. Cooper*, 12 Q. B. D. 94; 32 W. R. 32.

(*h*) *Gourand v. Fitzgerald and others*, 37 W. R. 55; affirmed on app. 1b. 265.

(*i*) Ord. XXXVI. r. 37.

(*k*) 2 Salk. 513; 1 Lord Ray. 256; 12 Mod. 139; 1 Will. Saund. 243.

(*l*) *Griffiths v. Lewis*, 8 Q. B. 851.

concerning the plaintiff," an innuendo is necessary to show in what way it relates to the plaintiff (*m*). And an innuendo may be good although not supported by a prefatory averment (*n*). Where the libellous meaning is apparent on the face of the libel itself, innuendoes are unnecessary (*o*). In an action for a libel imputing to the plaintiff that he was a "Truck-master," without any innuendo to explain the word, the defendant pleaded a justification, and gave evidence thereon, assuming the defamatory sense imputed to the word (*viz.*), that the plaintiff, a manufacturer, was guilty of practices in contravention of the Truck Act; but no direct evidence was given as to the meaning of the word "truck-master." It was held, that, although the word was not in any English dictionary, yet, as it was composed of common English words, the plaintiff was not bound to give evidence of its meaning, nor the judge to explain it to the jury, but that it was properly left to them to say, whether under all the circumstances, it was used in a defamatory sense (*p*).

Where there is nothing in the alleged libel that can, by any fair and reasonable intendment, from the words themselves, be construed as reflecting upon the character, capacity, or conduct of the plaintiff, the court will not, in the absence of a colloquium pointing to their meaning, or an averment of special damage, put a libellous construction upon them; but will read the words in their ordinary sense (*q*). It is not enough to show that the alleged libel has a malicious or calumnious tendency; it must be distinctly shown what the particular imputation is. So that where the words laid are not *per se* defamatory in their ordinary sense, or have apparently no meaning at all, there must be an innuendo in order to admit evidence as to any acquired meaning, or peculiar sense in which they were spoken, so as to be defamatory (*r*).

It is the duty of the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury

(*m*) *Clement v. Fisher* (in error), 7 B. & C. 459; *Lo Faux v. Mulcomson*, 1 H. L. 637.

(*n*) *Watkin v. Hall*, L. R. 3 Q. B. 402, per Blackburn, J.

(*o*) *Rovcliffe v. Edmonds and wife*, 7 M. & W. 12.

(*p*) *Homer v. Taunton*, 5 H. & N. F.8.

661; 29 L. J. Ex. 318.

(*q*) *Capel and others v. Jones*, 4 C. B. 259.

(*r*) *Rawlings and ux. v. Norbury*, 1 F. & F. 341; *Foulger v. Newcomb*, 36 L. J. Ex. 169; 2 L. R. Ex. 327; *Kelly v. Partington*, 5 B. & Adol. 649; *Ratcliffe v. Evans* (1892), 2 Q. B. 524.

CHAPTER XV. to say whether the publication has the meaning so ascribed to it (s). But where a libel does not necessarily impute misconduct to the plaintiff, the jury are not bound to adopt either the innuendoes or the opinions of the witnesses (t).

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And if the words used are not reasonably capable of the meaning ascribed to them by the innuendo; and there be no evidence in support of the meaning so ascribed, it is the duty of the judge either to nonsuit the plaintiff or to direct a verdict to be entered for the defendant (u).

Innuendoes must not be too wide.

If an innuendo be used, care should be taken that it be not too wide in its construction, for if the words of the alleged libel will not bear the construction put upon them by the innuendo, the plaintiff will not succeed in his action (x). And if in the opinion of the judge at the trial, the defamatory matter complained of will not bear the meaning alleged by the innuendo, a nonsuit will be directed (y).

Words capable of various interpretations.

If the words are capable of two meanings and the innuendo ascribe one of them, and is good on the face of it, the innuendo in such case will not be rejected (z). But where a communication is such that it is capable of many good interpretations, it is unreasonable that the only bad one should be seized upon to give a defamatory sense to it (a). In such case the defamer is he who, of many inferences, chooses the defamatory one (b).

Averment of special damage.

As to the averment of damage to the plaintiff resulting from the wrongful act of the defendant. Where *special damage* is the gist of the action, it has always been necessary that it should be *specifically* stated; and under the old system of pleading it was required to be stated in the body of the declaration. But where the words are actionable in themselves, and *general damages* are claimed, they need not be particularly stated. If the words are *not* actionable except on proof of special damage, a *sufficient* special damage must be alleged and proved. Formerly, in the absence of such an allegation, on

(s) *Sturt v. Blagg*, 10 Q. B. 908, 282.
per Wilde, C.J.

(t) *Broome v. Gosden*, 1 C. B. 728.

(u) *Hunt v. Goodlake*, 43 L. J. C. P. 54; 29 L. T. (N. S.) 472; *Mulligan v. Cole*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; *The Capital and Counties Bank v. Henty & Sons*, 7 App. Cas. 741; 52 L. J. Q. B. D. 232; and *vide Frost v. London Joint Stock Bank* (1906), 22 T. L. R. 760, C.A.

(x) *Gompertz v. Lery*, 9 A. & E.

(y) *Searles v. Scarlett* (1892), 2 Q. B. 56; 61 L. J. 573; *O'Hea v. Guardians Cork Union* (1892), L. R. (Ir.) 32 Q. B. D. 629.

(z) *Williams v. Scott*, 1 Cr. & Mee. 675, 687.

(a) Per Brett, M.R., 5 C. P. D. 541; 52 L. J. 256.

(b) Per Lord Bramwell, 7 App. Cas. 792; 52 L. J. Q. B. D. 259.

demurrer to the declaration, judgment might be given for the defendant (c). CHAPTER XV.
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Injury arising from a repetition by third parties of defamatory words spoken by the defendant, cannot be charged as special damage (d). Nor can the mere wrongful act of a third party, induced by the slander; as where the plaintiff was wrongfully dismissed from his master's service in consequence of a slander by the defendant (e). But in a subsequent case it was held, that where a third party acted upon a defamatory statement made against the plaintiff by the defendant, who was tenant to such third party, although not believing the statement, such act being the consequence of the slander, might be charged as special damage (f). Damage from repetition of slander :
indirect consequences.

CHAPTER XV.

PLEADINGS AND PROCEDURE IN ACTIONS OF SLANDER AND LIBEL.

PART II.—DEFENDANT'S PLEADINGS.

<i>Defence: R. S. C. as to.</i>	<i>Newspaper libel; statutory plea of apology and payment into Court.</i>
<i>Matter of defence, generally.</i>	<i>Offer of apology, when evidence in mitigation.</i>
<i>Truth, as a justification.</i>	<i>Payment into Court.</i>
<i>Newspaper reports of proceedings at public meetings, statutory defence as to.</i>	<i>Reply to Defence and Justification.</i>
	<i>Consolidation of actions of libel.</i>

ALTHOUGH the rules of procedure under the Judicature Acts have altered the former mode of pleading, they have not taken away any right which a defendant had, prior to those rules, of putting upon the record, matter of defence and justification to an action of slander or libel. Consequently, whatever was a good defence to any such action before the Judicature Acts and Rules, is a good defence still: and therefore many of the cases relating to such, under the former procedure, are retained in CHAPTER XV.
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- (c) *Roberts and wife v. Roberts*, 5 B. & S. 385; 33 L. J. Q. B. 249. see per Kelly, L.C.B., *Riding v. Smith*, 1 Ex. D. 93; 45 L. J. 283.
 (d) *Ward v. Weeks*, 7 Bing. 211; (e) *Vicars v. Wilcocks*, 8 East, 1; *Bateman v. Lyall*, 7 C. B. (N.S.) 638; *Morris v. Langdale*, 2 B. & P. 284.
Dixon v. Smith, 5 H. & N. 450; but (f) *Knight v. Gibbs*, 1 A. & E. 43.

CHAPTER XV. the text where they contain any leading principle on the sub-
 Part. II. ject: but those relating to mere technicalities in the *mode*
 of pleading, having become obsolete, are deleted.

R. S. C. as to Under the R. S. C., it is not sufficient for a defendant in
 Defence. his statement of defence to deny generally the grounds alleged
 in the statement of claim; or for a plaintiff in his reply to
 deny generally the grounds alleged in a defence by way of
 counter-claim; but each party must deal specifically with each
 allegation of fact, of which he does not admit the truth, except
 damages (a). The result is, therefore, that that most useful
 and comprehensive plea of the *general issue*, is in effect, abolished
 by this rule.

Statutable plea It is, however, expressly provided that nothing in those
 of the general rules contained shall affect the right of any defendant to plead
 issue. "Not Guilty" by statute. And every defence of "Not Guilty"
 by statute, has the same effect as a plea of "Not Guilty" by
 statute theretofore had. But if the defendant so plead, he
 will not be allowed to plead any other defence to the
 same cause of action, without the leave of the court or a
 judge (b).

Matter of The defence may therefore consist either in a mere denial of
 defence the fact of publishing the injurious matter as alleged; or of
 generally. the damage alleged to have resulted from it, when such con-
 sequential damage is the gist of the action; or of matter of
 justification or excuse, arising from collateral circumstances,
 or in some matter, which has discharged a previously existing
 right of action.

What was Under the former procedure, the plea of the general issue
 formerly avail- compelled the plaintiff to prove all the facts, as alleged in his
 able under the declaration, which were essential in law to his right to
 general issue. recover; consequently that plea was proper and sufficient in
 all cases where the defendant meant to deny or disprove any
 fact essential to the plaintiff's case. As where he meant to
 deny that he spoke the words, or published the libel set forth
 in the declaration; or that the terms of the alleged slander
 were used in the calumnious and actionable sense attributed to
 them by the plaintiff, or in any other defamatory or actionable
 sense which the words themselves imported; or that the in-
 jurious consequence alleged by the plaintiff, resulted from the
 act of speaking or publishing complained of. And he might
 also, in all cases where the occasion and circumstances of the
 publication were such as to call on the plaintiff to prove actual

(a) Ord. XIX, r. 17.

(b) Ord. XIX, r. 12

malice, establish such occasion and circumstances by evidence under the general issue; and such proof was a good defence, unless it appeared that he acted not honestly according to the occasion, but out of actual malice and ill-will. And the tendency of the alleged libel, as well as the lawfulness of the occasion, was put in issue by the same plea (c).

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Under the former procedure, the defence that the defamatory matter was published on a privileged occasion, was as already stated available under the plea of the general issue; but since that plea has been abolished, the defendant if intending to rely on the defence that the defamatory matter was published on a privileged occasion, must plead such in his defence; stating briefly, either in the defence itself, or in particulars delivered therewith, the grounds on which he relies in support of such alleged privilege, by referring to the occasion and circumstances on which the defamatory matter was published, and any further facts that may be necessary to sustain such defence (d).

Defence,
privileged
occasion.

Where a person seeks to shelter himself from liability for the publication of a libel on the ground of duty, he must show on the face of his defence on what account, or under what circumstances, it was part of his duty to publish the libel (e).

Privilege on
ground of duty.

It is obviously necessary, that a party charged with the commission of an illegal or immoral act, should be apprised, by means of a special plea or defence, of the nature and circumstances of the charge, in order that he may be prepared to meet it, and if it be unfounded to refute it. The rule of law upon this head has long been settled, that the defendant, if he means to rely upon the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially as a justification (f).

Truth as a
justification.

Where the action was for publishing of the plaintiff—"He is a thief"; the defendant pleaded, that the plaintiff had been guilty of stealing six sheep. The plaintiff replied, that after the felony, and before the publication of the words, he had been pardoned by a general pardon (g). Upon a demurrer, this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon. And it was held, that it makes no difference in such case, whether

Truth as a
justification
to a charge
of felony:

replication,
a general
pardon.

(c) *Vide Hoare v. Silverlock*, 9 C. B. 26; *Smith v. Thomas*, 2 Bing. N. C. 372.

(e) *Oliver v. Bentinck*, 3 Taunt. 456, 460.

(d) *Belt v. Lawes*, 51 L. J. Q. B. D. 359.

(f) *Smith v. Richardson*, Willes, 20.

(g) *Cuddington v. Wilkins*, Hob. 81; *Underwood v. Parks*, Str. 1200.

CHAPTER XV. the pardon be general or special, of which the defendant might
 Part II. have been ignorant, for that every person who publishes
 slanderous words does it at his peril.

Justification
 of terms
 "convicted
 felon" and
 "felon editor."

In an action for a libel, published in a newspaper, imputing to the editor of another newspaper that he was "a convicted felon," and "a bankrupt and felon editor." The defendant justified, that the plaintiff had been convicted of felony, and was sentenced to 12 months hard labour, for stealing feathers; and that the article complained of was a *bonâ fide* comment upon the conduct of the plaintiff in his character of editor of the said newspaper. The reply alleged that the plaintiff endured the punishment for which he was adjudged for the supposed felony, and thereby became and was in the same position as if a pardon under the Great Seal had been granted. On demurrer to the plea of justification, it was held to be no justification that the plaintiff had been convicted of felony, without showing that he had actually committed the felony. Held also, on demurrer, that the plaintiff was entitled to judgment on the reply. And per Brett and Cotton, L.JJ., a person convicted of felony, after enduring the punishment is in law no longer a felon; the justification was therefore bad for not alleging that, as to the imputation "felon editor," the plaintiff was then *enduring* his punishment (*li*).

General pleas
 of justification
 are bad.

Though the charge imputed to the plaintiff be general, the defendant must, in his defence by way of justification, charge specific instances of offences of the same nature with the general charge; for whenever one charges another with fraud, he must know the particular instances upon which his accusation is founded, and therefore ought to disclose them, either in his defence or by particulars delivered therewith (*i*). A plea which simply adopts the sense imputed to the words by the innuendo, but does not justify them in the same sense, has been held a bad plea (*k*).

Rule of law
 as to.

It has long been a well-established rule of law that in slander, as well as in libel, where the charge is general in its nature, if the defendant desires to justify the charge as true, he must state some *specific instances* of the misconduct imputed to the plaintiff (*l*); either on the face of his defence or by particulars

(*k*) *Leyman v. Latimer*, 3 Ex. D. 16 G. 3; 2 Chit. Rep. 665.
 15, 352; 46 L. J. 765; 47 L. J. 470.

(*l*) *White v. Tyrrell*, 5 Ir. C. L. R. (N. S.) 498.

(*i*) *F. Anson v. Stuart*, 1 T. R. 748;

Behrens and others v. Allen, 8 Jur. (N. S.) 118; *Morris v. Langdale*, 2 B. & P. 284; *Newman v. Bailey*, Hil.

(*l*) *Hickinbotham v. Leach*, 10 M. & W. 361, per Parke, B.; and see *Burgess v. Beaumont*, 7 M. & Gr. 962.

delivered therewith ; otherwise the justification may be struck out (m). CHAPTER XV.
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The particulars relied on in support of a general plea of justification should be as explicit as the former plea of justification was required to be under the old system of pleading. Particulars in support of general plea of justification.

And accordingly where the charge was in general terms, that the plaintiffs were "Charity Swindlers" and "Impostors," and that the Home they kept was "a monstrous swindle": the defendant pleaded generally by way of justification, that the statements complained of were true in substance and in fact; it was held, that he must state specifically, in his particulars, the facts and instances on which he intended to rely in support of such a general justification; and that he could not refuse to do so on the ground, merely, that he would thereby have to disclose the names of the witnesses he proposed to call at the trial (n). Where the defence is one of fair comment, only, and there is no plea of justification, the plaintiff is not entitled to particulars (o).

In the review of a book of which the plaintiff was author, the defendants published a statement that the author was, by his own confession "a most barefaced liar." In an action of libel the defendants pleaded that so far as the alleged libel was a matter of fact it was true; and so far as it was a matter of criticism it was published *bonâ fide*: it was held, that the plaintiff was entitled to particulars specifying the pages in the book where the passages relied on occurred (p).

Where to an action of libel, the defendant pleaded a denial of the meaning alleged in the statement of claim, or "of any meaning defamatory of the plaintiff"; and then alleged that the libel was true in substance and in fact; this was held to be a double defence, founded on separate and distinct facts; and that on account of the generality and embarrassing nature of the pleading, the plaintiff was entitled to particulars of the facts relied upon in justification (q). Double or embarrassing defence.

It is necessary that the matter justified as true, should in every respect correspond with the imputation complained of. The matter justified must be identical with that charged.

(m) *Jones v. Hewicke*, L. R. 5 C. P. 32; *Gourley v. Plimsoil*, 42 L. J. C. P. 121.

(n) *Zierenberg and wife v. Labouchere* (1893), 2 Q. B. 185; 63 L. J. 90; and see *Hewson v. Cleere* (1904), 2 K. B. D. (Ir.) 536, as to waiving right

to particulars.

(o) *Digby v. The Financial News, Ltd.*, 1 K. B. (1907), 502, C. A.

(p) *Devereux v. Clarke and another*, (1891) 2 Q. B. 582; 60 L. J. 773.

(q) *Hennessey v. Wright*, 57 L. J. Q. B. D. 594.

CHAPTER XV. Thus, where the defendant charges the plaintiff with having feloniously stolen one kind of chattel, he will not be permitted to justify by pleading that the plaintiff had been guilty of stealing a different one (*r*). And so with regard to every circumstance at all material, the facts set up by way of justification, must be strictly conformable to the imputation charged (*s*). And a defendant will not be allowed, in his pleading, to impute another meaning to his words, different to that alleged by the plaintiff in his innuendo, and then to justify the words. Nor will he be allowed to bring forward a charge connected with the alleged libel, but of which the plaintiff has not complained, and then to justify such charge (*t*).

If a libel charges the commission of several crimes, or the commission of a crime, in a particular manner, it is necessary to justify the charge as to the number of crimes (*u*), or the manner of committing the crime. If the crime is charged under circumstances of aggravation, the justification should cover the aggravating circumstances as well as the crime (*x*).

When defence sufficient if substance of charge justified.

Still, it is sufficient, where the charge is general in its terms, if the substance of the libel be justified (*y*). And where the defendants published a placard headed "Caution," containing the plaintiff's name and address, and stating that he had been convicted of travelling on their railway without having first paid his fare. In an action for the libel, the declaration contained an innuendo that the defendants meant thereby that the plaintiff had attempted to defraud the company; the defendants pleaded a justification to the effect that the plaintiff was so charged and convicted as in the declaration mentioned; and it was held, on demurrer, that the plea was good, as containing a justification of the libel in the terms alleged in the innuendo (*z*).

Not necessary to justify every epithet.

It is not necessary that the justification should extend to every epithet of the defamatory matter, however offensive, unless each contains a different and distinct charge to that

(*r*) *Hilsden v. Mercer*, Cro. J. 676.

(*s*) *Upsheer v. Betts*, Cro. J. 578.

(*t*) *Bremridge v. Latimer*, 12 W. R. 878; 10 L. T. (N. S.) 816; *Russam v. Budge* (1893), 1 Q. B. 571; 62 L. J. 312; and see *M. Munus v. M. Enroe*, 1 Ir. C. L. R. 332; *O'Brien v. Bryant*, 16 M. & W. 168.

(*u*) *Clarke v. Taylor*, 2 Bing. N. C. 654.

(*x*) *Helsham v. Blackwood and another*, 11 C. B. 129; 20 L. J. C. P. 187; *Goodburne v. Bowman and others*, 9 Bing. 532.

(*y*) *Edwards v. Bell*, 1 Bing. 403; and see *Tighe v. Cooper*, 7 E. & B. 39; 26 L. J. Q. B. 215.

(*z*) *Biggs v. G. E. Ry. Co.*, 18 L. T. (N. S.) 482; 16 W. R. 908; *Alexander v. N. E. Ry. Co.*, 6 B. & S. 340.

which the plea professes to justify (a). But in all cases, as much must be justified as meets the sting of the charge: and if anything be contained in a charge which does not add to the sting of it, that need not be justified (b).

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Pleas professing to justify the entire libel, but in effect leaving uncovered a material part of it, have always been held bad (c). And where the libel complained of was contained in a report of the trial of the plaintiff for murder; on which he was acquitted: the report in question appeared in a magazine twenty years after the trial took place, and alluded to a "damning piece of evidence" which was not elicited at the trial: it was held, that a plea which professed to justify the whole charge, but left uncovered the latter imputation, was bad (d). So also in an action for a libel contained in two letters published in a newspaper, the defendant pleaded, by way of justification, that the second letter (which in itself contained a distinct substantive libel) was a fair comment upon the facts stated in the first letter; it was held, on demurrer, to be a bad plea (e).

All material parts of the libel must be covered by the justification.

If a libel contain statements that are divisible, one or more of such statements may be justified apart from the rest, if a proper justification can be made out (f). But a defendant has no right to select for justification a part of a libel, which, standing alone, would possibly not be actionable (g). For, although he may separate and distinctly justify different parts, where each part imports a distinct charge; if he omit a part it becomes a question whether the part so omitted would of itself afford ground of action. And if a libellous construction be put upon such part by innuendo, it must be answered (h). If the part not justified contain libellous matter, the defendant

Justification of divisible statements in a Libel.

(a) *Morrison and another v. Harmer and another*, 3 Bing. N. C. 759; 4 Scott, 524.

(b) *Edwards v. Bell*, 1 Bing. 409; *Lay v. Lawson*, 4 A. & E. 795.

(c) *Clarkson v. Lawson*, 6 Bing. 273; *Eaton v. Johns*, 1 Dowl. (N. S.) 602; *Edsall v. Russell*, 4 M. & Gr. 1090; 5 Scott, N. R. 801; *Ingram v. Lawson*, 5 Bing. N. C. 66; 6 Scott, 775; *Cooper v. Lawson*, 8 A. & E. 746; *Smith v. Parker*, 13 M. & W. 459; 2 Dowl. & L. 394.

(d) *Helsham v. Blackwood and another*, 11 C. B. 111; 20 L. J. C. P. 187.

(e) *Walker v. Brogden*, 19 C. B. (N. S.) 65; and see *Mountney v. Watton*, 2 B. & Adol. 673.

(f) *Clarkson v. Lawson*, 6 Bing. 587; and see *M'Gregor v. Gregory*, 11 M. & W. 294; 2 Dowl. P. C. N. S. 769; *Mountney v. Watton*, 2 B. & Adol. 673; *Biddulph v. Chamberlayne*, 17 Q. B. 351; *Fleming v. Dollar*, *infra*.

(g) *Roberts v. Brown*, 4 M. & Sc. 407; *Edsall v. Russell*, 4 M. & Gr. 1090.

(h) *Clarke v. Taylor and another*, 2 Bing. N. C. 654; 3 Scott, 95.

CHAPTER XV. is liable in damages for that which is uncovered by the justification ; though if the matter unjustified do not contain any *substantive imputation*, and the jury find that the justification is proved, and give a verdict for the defendants, the court will not disturb the verdict (*i*).

Pleading to Where a declaration contained separate counts for distinct several Counts. libels, the defendant was not allowed to plead simply one general plea of justification to them all (*k*). And the law remains the same under the R. S. C., whereby a defendant is required to deal specifically with each allegation of fact of which he does not admit the truth (*l*).

That, a fair and accurate report of proceedings in Court. Under the "Law of Libel Amendment Act, 1888" (*m*), a statutory defence on the ground of privilege may now be pleaded to an action for a libel contained in a newspaper report of proceedings publicly heard in a court of justice.

In a defence pleaded under this section it must be shown, not only that the report is fair and accurate, but that the proceedings were publicly heard before a court exercising judicial authority: and further, that the report itself was published contemporaneously with such proceedings.

What is a fair and accurate report. It has been held, in cases prior to this statute, that a plea professing to justify a report of proceedings before a magistrate on the ground that it was a fair and accurate report, should state the terms of the charge or accusation, not merely the result of it: for if the terms in which it was preferred were stated, it might carry with it its own refutation or explanation (*n*). And therefore it is not sufficient to allege that it is in *substance* a fair, truthful, and accurate report: for the substance is nothing more than the inference which the publisher of the libel has drawn from what passed at the trial (*o*). Nor is it sufficient to give a short summary of the trial of an action, and after that summary, an outline of the speech of counsel for the defendant (*p*).

Fair report of the judgment only. It has been held, that it is not sufficient to plead either by way of justification or as a defence on the ground of privilege, that the publication complained of is a fair and accurate report of the

(*i*) *Clarke v. Taylor and another*, 2 Bing. N. C. 654; 3 Scott, 95; and see *Cooper v. Lawson*, 8 A. & E. 754.

(*k*) *Honess and another v. Stubbs*, 7 C. B. (N. S.) 555; 29 L. J. C. P. 220; *Fleming v. Dollar*, 23 Q. B. D. 388; 58 L. J. 548.

(*l*) Ord. XIX. r. 17.

(*m*) 51 & 52 Vict. c. 64, s. 3.

(*n*) *Delegal v. Highley*, 3 Bing. N. C. 962.

(*o*) *Flint v. Pike*, 4 B. & C. 473.

(*p*) *Lewis v. Walter*, 4 B. & A. 605; *Lewis v. Levy*, E. B. & E. 537; 27 L. J. Q. B. 282.

judgment delivered by the judge who tried the case: the defendant must plead, and be prepared to substantiate to the satisfaction of a jury, that the publication is a fair and accurate report of the proceedings at the trial as a whole (q).

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A publication of the proceedings of a court of justice cannot be justified if it contain disparaging observations made by any other than the judge himself, or one whose duty called upon him to make them. Remarks made by strangers and bystanders are altogether unwarranted and cannot be justified (r).

No justification
as to remarks
by strangers
and bystanders.

Under the "Law of Libel Amendment Act, 1888" (s), a statutory defence, on the ground of privilege, may now be pleaded to an action for a libel contained in any newspaper report of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board of local authority constituted under the provisions of any act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by Letters Patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, or of any meeting of justices of the peace in Quarter Sessions assembled for administrative or deliberative purposes.

Newspaper
reports of
proceedings
at public
meetings.

In pleading a defence under this section, it is necessary to show that the meeting was a public one within the meaning of the statute, that the report is fair and accurate, that it was published without malice, and that the matter complained of was of public concern, and also that the publication thereof was for the public benefit. And, it should be observed, a defence under the statute will not be available if the defendant has been requested to insert in the newspaper in which the report was published, a reasonable letter or statement by way of contradiction or explanation, and has refused or neglected to insert the same (t).

As to justification on the ground that the matter complained of was fair comment on a matter of public interest, that the

Justification as
to matters of
public interest.

(q) *Macdougall v. Knight*, 14 App. Cas. 194 ; 58 L. J. Q. B. D. 537 ; but query? see *Macdougall v. Knight* (No. 2), 25 Q. B. D. 10 ; 59 L. J. 522-4.

(r) *Delegal v. Highley*, 3 Bing. N. C. 950, 961.

(s) 51 & 52 Vict. c. 64, s. 4.

(t) *Ibid.*

CHAPTER XV.
Part II.

Newspaper libel :
Statutory plea of apology and payment into court.

Defendant not to file such plea without paying money into court.

The apology must appear in a prominent part of the paper.

Plea of agreement to accept the publication of mutual apologies.

Offer of apology, when evidence in mitigation of damages.

same was published *bonâ fide* and in the belief that it was true ; there is no ground of privilege to sustain such a defence if the matter complained of be untrue ; and the rule of law which allows full freedom of comment and discussion by writers upon matters of public interest, does not extend to imputations upon personal character (*u*).

As to those cases in which the defendant may plead a statutory plea, to the effect that the alleged libel was published without actual malice and without gross negligence and that he afterwards published, or offered to publish, a full apology for such libel. The section of the statute (*x*) authorising such a plea does not apply to slander, but to libel only, and exclusively to such libels as are contained in any published newspaper or other periodical publication. And to such plea it is competent to the plaintiff to reply generally, denying the whole of such plea (*y*).

By a subsequent statute (*z*) it is not competent to a defendant in such action, whether in England or in Ireland, to file any such plea without at the same time making a payment of money into court by way of amends : and every such plea so filed without payment of money into court will be deemed a nullity, and may be treated as such by the plaintiff in the action.

The apology must be inserted in some prominent part of the newspaper : if it be put among the notices to correspondents and in small type, it will not be sufficient (*a*). And where a statutable plea of apology is pleaded, it is for the jury to say whether it is reasonably sufficient (*b*).

It has been held to be a good plea to an action for libel, that after the commencement of the suit, the plaintiff and defendant agreed to accept the publication of mutual apologies in satisfaction and discharge of the causes of action, damages and costs, and that such apologies were published (*c*).

Under the Libel Act, 1843 (*d*), in any action for defamation (*e*) the defendant (after notice in writing of his intention

(*u*) Vide *Campbell v. Spottiswoode*, 3 B. & S. 769 ; 32 L. J. Q. B. 185 ; *Merivale v. Carson*, 20 Q. B. D. 275.

(*x*) 6 & 7 Vict. c. 96, s. 2.

(*y*) See *Oxley v. Wilkes and others*, C. A. (1898) 2 Q. B. 56.

(*z*) 8 & 9 Vict. c. 75, s. 2.

(*a*) *Lafone v. Smith and others*, 3 H. & N. 735 ; 28 L. J. Ex. 33.

(*b*) *Risk Allah Bey v. Johnstone*, L. T. (N. S.) 620, per Cockburn, L.C.J.

(*c*) *Boosey v. Wood*, 3 H. & C. 48 ; 34 L. J. Ex. 65.

(*d*) 6 & 7 Vict. c. 96, s. 1.

(*e*) This section applies to Slander as well as Libel.

so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), may give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

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If an apology be offered for an alleged slander before action commenced, the plaintiff's solicitor will not be permitted to stipulate for exorbitant costs as the main condition of accepting the apology; and in the event of the action being commenced in the alternative, the court will order the proceedings to be stayed on payment of a reasonable amount for costs (*f*).

As to payment into court in satisfaction, under the Rules of the Supreme Court:—Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time, by leave of the court, or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (*except in actions or counter-claims for slander or libel*), pay money into court, which shall be subject to the provisions of Rule 6 (*g*).

Payment into
court under
the Rules.

By the above-mentioned rule, a defendant, by paying money into court in an action or counterclaim for slander or libel, admits the claim or cause of action in respect of which the payment is made. And he cannot, with a payment into court, plead a justification to the same libel, nor a defence denying liability (*h*).

Where, in an action of libel the defendant paid money into court in satisfaction of plaintiff's claim. The plaintiff did not take the money out; but before the action could be tried the defendant died. The defendant's executors then applied for an order for payment out to them: it was held that their application must be refused and the money be paid out to the plaintiff (*i*).

Death of
defendant.

And where in an action of libel the defendant pleaded an apology and paid money into court; the plaintiff did not take

Death of
plaintiff.

(*f*) *Miller v. Drury*, 12 L. T. (N. S.) 464.

(*g*) R. S. C. 1883, Ord. XXII. r. 1; and R. S. C. (July), 1901.

(*h*) R. S. C., Ord. XXII. r. 5;

Fleming v. Dollar, 23 Q. B. D. 388; *vide Farquhar, North & Co. v. Lloyd* (1901), 17 T. L. R. 568.

(*i*) *Brown v. Feeney*, 1 K. B. (1906), C. A. 563.

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the money out of court, and died before the case came on for trial: it was held, that a judge at chambers had power, in his discretion to order that the money be paid out to the plaintiff's executor (*k*).

Payment in
before defence.

If the defendant pays money into court before delivering his defence, he must serve upon the plaintiff a notice specifying both the fact that he has paid in such money, and also the claim or cause of action in respect of which such payment has been made (*l*).

Plea of alteration of MS. by Editor.

It is no answer to an action for a libel published in a newspaper, to say, that the manuscript has been altered by the editor and does not correspond with what appeared in print, if the alterations were mere omissions of certain passages that were more offensive than those actually published, and were not a qualification of the libel (*m*).

Defence,
accidental
publication.

Where the defendant pleaded that a letter containing a libel was intended to come into the hands of the plaintiff himself but by mistake was sent to the plaintiff's employer, it was held on demurrer that the plea was bad (*n*).

Pleading,
defence,
rumour of
evil reputation.

Where the plaintiff, a racing jockey, sued the defendant for damages for libel which charged him with unfairly and dishonestly riding the horses of a certain stable; the defendant having pleaded a justification, afterwards sought leave to amend his defence by adding a paragraph stating, that at the date alleged the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding race-horses in races as to prevent them from winning. It was held, that such an amendment could not be allowed, as it was contrary alike to the law, and to the rules of pleading: that general evidence of the plaintiff's bad reputation (if admissible at all) could only be given in mitigation of damages and not in answer to the action (*o*).

Reply:

As to the Reply:—Although it seldom happens that anything can be replied to the defendant's defence of justification except the joinder of issue; in some instances a special replication is necessary. As where the original slander imputes

of pardon to
a justification
charging
felony.

(*k*) *Maxwell v. Wolseley*, 1 K. B. (1907), 274.

(*l*) R. S. C. Ord. XXII. r. 4.

(*m*) *Tarpley v. Blabey*, 2 Bing. N. C. 437; and see *Pierce v. Ellis*, 6 Ir. C. L. R. 55.

(*n*) *Fox v. Broderick*, 14 Ir. C. L. R.

453, per Fitzgerald and Hughes, BB. see *Tompson v. Dashwood*, 11 Q. B. D. 43; 52 L. J. 425; but see *Hebditch v. MacIlwaine* (1894), 2 Q. B. 59; 63 L. J. 589.

(*o*) *Wood v. Durham (Earl of)*, 21 Q. B. D. 501; 57 L. J. 547.

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to the plaintiff the commission of a specific crime, and the defendant pleads in justification that the plaintiff was really guilty, the plaintiff may reply, that after his commission of the crime and before the speaking of the words, he was pardoned (*p*).

A reply, alleging that the plaintiff duly endured the punishment awarded to him for the supposed felony, and thereby became and was in the same position as if he had received a pardon under the Great Seal, has been held good on demurrer (*q*).

That plaintiff endured the punishment.

Where the libel complained of, consists in the imputation of a crime, and a justification is pleaded; it appears that a replication setting up the acquittal of the plaintiff, by way of *estoppel*, would be bad (*r*).

Reply—acquittal.

Upon the construction of the latter part of section 2 of the Libel Act, 1843 (*s*), that, "To such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea," it has been held, on demurrer, that a plaintiff, in his replication, is at liberty to deny the whole or any part of such plea; and that a replication which admitted that the libel was inserted in a newspaper, and the payment of money into court, and traversed the insertion of the libel without malice and without gross negligence, and the sufficiency of the apology, and of the money paid into court as amends, was good (*t*).

Reply to plea under the Libel Act, 1843.

By the R. S. C. (*u*), no demurrer shall be allowed. But any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial; provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

Demurrer, of proceedings in lieu of.

By the Law of Libel Amendment Act, 1888 (*x*), it is now competent for a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and after

Consolidation of actions of libel.

(*p*) *Cuddington v. Wilkins*, Hob. 187.
81; see *supra*, p. 245.

(*q*) *Leyman v. Latimer*, 3 Ex. D. 15, 352; 46 L. J. 765; 47 L. J. 470.

(*r*) *Helsham v. Blackwood and another*, 11 C. B. 111; 20 L. J. C. P.

(*s*) 6 & 7 Vict. c. 96.

(*t*) *Chadwick v. Herapath*, 3 C. B. 885.

(*u*) Ord. XXV.

(*x*) 51 & 52 Vict. c. 64, s. 5.

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on this enact-
ment.

such order has been made, and before the trial of the said actions, the defendants in any new actions instituted in respect to the same, or substantially the same, libel, shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.

It should be observed that this enactment does not enable a plaintiff to join several different parties in one action; it only authorises different defendants, when sued in separate actions, in respect of the same, or substantially the same, libel, to make application for an order of consolidation of the actions, so that they may be tried together. The section does not specify at what stage of the proceedings the application for the order is to be made; it would therefore appear that the order may be made at any stage. The jurisdiction being discretionary the order of consolidation may be made before the delivery of defences in either of the actions: but where the defendants desire to set up different defences, the order of consolidation should be so framed as to admit of their doing (y).

The enactment applies to actions of libel only, and not to those of slander.

(y) *Stone v. Press Association, Ltd.*, C. A. (1897), 2 Q. B. 159.

SLANDER AND LIBEL.

CHAPTER XVI.

PLAINTIFF'S PROOFS.

<i>Proof of Special Character and extrinsic facts.</i>	<i>Publication by Agents, Servants, and others.</i>
<i>Proof of qualifications of Solicitors, Medical Practitioners, and others.</i>	<i>" by Booksellers, Newspaper Proprietors, and others.</i>
<i>Where the words import the fact of Plaintiff holding office, &c.</i>	<i>Secondary evidence of letters and papers containing Libels.</i>
<i>Evidence of publication.</i>	<i>Application of the Defamatory matter to the Plaintiff.</i>
<i>Proof of equivalent words not sufficient.</i>	<i>Meaning of the Defendant as averred by innuendo.</i>
<i>Publication, direct and indirect proof of.</i>	<i>Where the meaning is apparent on the Libel itself.</i>
<i>Libel in handwriting of Defendant.</i>	
<i>Publication by letter.</i>	
<i>" to wife, of libel on husband, and vice versa.</i>	

As to evidence of special character and extrinsic facts. Where CHAPTER XVI.
the special character or office of the plaintiff is essential to Proof of special character and extrinsic facts.
the action, it may be averred either generally or particularly:
and when denied upon the pleadings, or stated to be not
admitted, it must be proved as laid. If not so denied or
stated, it will be taken to be admitted, and no evidence will
then be required in support of it (a). But where the words
themselves admit the plaintiff's special character or office,
neither averment nor evidence of it is requisite.

In some cases, in the absence of any such averment or admission, the matter, as appearing upon the record, may not be legally defamatory. And so in the case of an action by a clergyman in holy orders, for slander charging him with incontinence, there must be an averment on the face of the Statement of Claim, showing that the plaintiff was, at the time of the slander, a beneficed clergyman, or in the actual receipt

(a) R. S. C. 1883, Ord. XIX., rr. 13, 15, and 17

CHAPTER XVI. of beneficial emolument, as a preacher, lecturer, curate, or the like ; and the 61st section of the C. L. P. Act, 1852, did not remedy such an omission (b). And where the words are alleged to have been spoken of the plaintiff in his special character or office, and are actionable only in that respect, such special character must be proved if put in issue on the pleadings. But where a plaintiff avers generally that he filled any particular situation or office, in which he has been calumniated, or that he exercised any particular profession or business, it is sufficient to give general evidence of his having acted in that office or situation, or of his having exercised that particular profession, or carried on that trade or business. If it be alleged that the plaintiff was, at the time of the alleged injury, a magistrate or police officer, it will be sufficient to show that he previously acted as such. And in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without proving their appointments (c).

Proof of holding office of Justice of the Peace, Constable, &c.

Proof of appointment of Assistant Overseer.

Averments that the plaintiff had been "appointed" an assistant-overseer, and had passed certain accounts "as such assistant-overseer" ; the former averment is sufficiently proved by an appointment by the justices, and his having acted as such. And his book of accounts being headed "overseer's accounts," does not make those accounts less his own : by his warrant of appointment he is required to verify them (d).

Nature of the evidence in support of general averment of special character or office.

Although the averment or allegation of special character or office be general, yet if it should appear by the defence that the defendant means to dispute the plaintiff's title to the office, situation, or other special character to which the slander or libel relate, the plaintiff must be prepared with the best evidence to establish the fact. For if a man sues for a slander of him in his profession, unless he is a properly qualified practitioner the action cannot be sustained (e).

Proof of qualifications of Solicitors and others.

If it be alleged that the plaintiff was a solicitor of such a court, it is sufficient to show that he was before, and at the time, practising as a solicitor of that court (f) : and the Stamp Office certificate, countersigned by a Master of the Court of King's Bench, to denote that his name has been entered on the roll of that court, has been held to be *prima facie* sufficient

(b) *Gallwey v. Marshall*, 23 L. J. Ex. 78 ; 9 Ex. 294.

(c) *Berryman v. Wise*, 4 T. R. 366 ; *Gordon's case*, Leach, 581 ; *R. v. Shelly*, Leach, 581.

(d) *Cannell v. Curtis*, 2 Bing. N. C. 228 ; 2 Scott, 379.

(e) *Vide Collins v. Carnegie*, 1 A. & E. 695 ; 3 Nev. & Man. 710.

(f) *Berryman v. Wise*, 4 T. R. 366.

evidence to support an allegation in the declaration that the plaintiff was an attorney of that court (*g*). But now, by the 23 & 24 Vict. c. 127, s. 22, any list of attorneys, solicitors and conveyancers, purporting to be published by the authority of the Commissioners of the Inland Revenue (*h*), and to contain the names of attorneys, solicitors, and conveyancers, who have obtained stamped certificates for the current year, on or before the first of January in the same year, will, until the contrary be made to appear, be evidence in all courts and before all justices of the peace and others, that the persons named therein as attorneys, &c., holding such certificates for the current year, are attorneys, &c., holding such; and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid that such person is not qualified to practise as an attorney, solicitor, or conveyancer under a certificate for the current year: but in the case of any person being an attorney or solicitor whose name does not appear in such list, an extract from the roll of attorneys and solicitors kept by the registrar certified under the hand of the secretary of the Incorporated Law Society (which society perform the duty of registrar), or of the registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract; and in the case of any person being a conveyancer whose name does not appear on such list, the fact of his being so shall be proved in the way in which it is by law now required to be proved.

Previously to the C. L. P. Act, 1852, where the action was for slander, imputing to a physician that he was not a properly qualified practitioner, the plaintiff was bound to prove, *under the general issue*, not only that he practised as a physician, but also that he practised lawfully (*i*); but now, the truth of the matter charged, if relied on as a defence, must be so pleaded; and therefore in the absence of any such defence, or of any traverse or denial of the plaintiff's professional qualification, it will be treated as admitted on the face of the record (*k*).

And a copy of "The Medical Register" for the time being, purporting to be printed and published under the direction of the General Council, is evidence in all courts and before all

(*g*) *Sparling v. Haddon*, 2 M. & Scott, 14.

(*h*) The "Law List" purports to be so published.

(*i*) *Collins v. Carnegie*, 3 Nev. & Man. 710.

(*k*) R. S. C., 1883, Ord. XIX. r. 13.

Proof of qualifications of practitioners in Medicine and Surgery.

Medical Register evidence of qualification for certain purposes.

CHAPTER XVI. justices of the peace, and others, that the persons therein specified are registered according to the provisions of the Medical Acts; and the absence of the name of any person from such copy is evidence, until the contrary be made to appear, that such person is not so registered. Provided always, that in the case of any person whose name does not appear in such copy, a certified copy under the hand of the registrar of the General Council, or of any branch council, of the entry of the name of such person on the general or local register, is evidence that such person is duly registered (l).

But not exclusive evidence in defamation.

It does not follow, however, in an action for defamation brought by a medical practitioner, that he will not be able to recover damages in respect of such defamation because he is not registered under the Medical Acts. In the case of a non-registered practitioner, if his qualification be traversed and denied, it must be proved by the production of his diploma, or in any other manner in which, before the above mentioned Acts, such qualification might have been proved.

Where the words import the fact of Plaintiff holding Office, &c.

If it appears by the slander or libel to be assumed that the plaintiff possesses the character or fills the situation or office in which he is defamed, or assumes the truth of facts to which the slander or libel relates, it operates by way of admission, and no further evidence of the fact is necessary (m). But where the libel in substance charged that the plaintiff had conducted himself as a member of the Royal College of Surgeons in such a manner as to expose himself to expulsion. In the prefatory averment of the declaration it was stated, that the said college had the power of expelling persons guilty of unprofessional conduct. The defendant pleaded that the plaintiff was not at the time, &c., a surgeon and member of the Royal College of Surgeons *having the power of expelling persons guilty of unprofessional conduct, &c.*; and it was held, that the traverse put in issue the power of the college to expel; and that the statement in the libel itself was not sufficient evidence of such power (n).

Rebutting evidence in support of character impeached.

But whenever the defendant is permitted to impeach the plaintiff's character in order to mitigate the damages, it is clear that the plaintiff may, on the other hand, give rebutting evidence in support of his good character; though not allowed to

(l) 21 & 22 Vict. c. 90, s. 27; 49 & 50 Vict. c. 48, s. 14.

(m) *Berryman v. Wise*, 4 T. R. 366; and see *Smith v. Taylor*, 1 B. & P.

N. R. 204; *Frisarri v. Clement*, 3 Bing. 432.

(n) *Wakley v. Healey and another*, 4 Ex. 53; 18 L. J. Ex. (N. S.) 426.

adduce such evidence in the first instance. And now, since CHAPTER XVI.
 the Judicature Acts, under which a new system of pleading has been prescribed, the "material facts" upon which the party pleading relies must be stated in his pleading (o). A defendant, therefore, intending to impeach the plaintiff's character at the trial, by evidence in mitigation of damages, must either notify the fact in his pleading, or give particulars thereof seven days before the trial (p). The object of this rule is to prevent the plaintiff from being taken by surprise as to the nature of the evidence to be adduced against him; and to afford him an opportunity of being prepared with evidence to rebut, or to explain, that intended to be brought forward in impeachment of his character.

It is, of course, essential to the production of any loss or Evidence of publication.
 damage to the plaintiff, that the slanderous matter should have been communicated or published to some third person: in this respect *civil* differs from *criminal* liability; the latter, as will be seen, may be consummated by a publication (of a libel) to the party defamed without more; but, with the exception of the case of libel, the means of publication are indifferent, and do not affect the right of action. In the case of libel, it is sufficient if the defendant be the partial instrument of communication, either by assisting in its original construction or subsequent promulgation; if one party were to dictate, a second to write, and a third to distribute written or printed slander, the plaintiff would be without remedy, unless each of these parties were to be considered as responsible for the whole effect produced.

The term "published" is therefore the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him (q). Where the action is for words spoken, evidence of the speaking before any third person will be sufficient. And where the words are in themselves actionable, it is sufficient to prove some of them which are actionable, provided they be proved as laid (r). Proof of equivalent words of slander not sufficient.
 But it is not sufficient to prove *equivalent* words of slander, though they be explained in the same sense by the defendant

(o) See R. S. C. 1883, Ord. XIX.
 r. 4.

(q) *Lamb's case*, 9 Rep. 59.

(r) 2 East, 434; 8 T. R. 150.

(p) *Ibid.* Ord. XXXVI. r. 37.

CHAPTER XVI. himself (s). If the words be spoken, or libel published, in a foreign language, or in characters not understood by those who hear or see them, there is no publication; since there is no communication prejudicial to the plaintiff.

What a publication sufficient to support indictment or criminal information. If the words be spoken, or libel addressed to the plaintiff only, without further publication, no action is maintainable (t), since no temporal damage can have accrued from the defendant's act (u): but a publication to the prosecutor only is sufficient to sustain an indictment for a libel, on the ground of its tendency to produce a breach of the peace (x). It is not necessary therefore, in a prosecution for a libel, whether by indictment or criminal information, to prove a publication to several persons; publication to one, or even to the prosecutor himself, is all that is required. But where the defendant has given a wide or mischievous circulation to the libel, or has used means otherwise more or less malicious in his mode of publication, the injury is thereby aggravated; and evidence thereof may be given, whether the proceeding is by action or prosecution, for the purpose of showing the nature and extent of the mischief, the *animus* of the defendant, or in aggravation of the punishment.

What a sufficient publication to support a civil action. To support a civil action it is essential, as has already been observed, to prove a publication of the slander or libel, to some third person.

Reading a libel aloud. If a person having a libel in his possession, or a copy of such, read it to one or more persons, the person so reading it is a publisher of the libel, and liable for such publication (y). And where the defendant received an anonymous letter (containing defamatory matter of the plaintiff) whilst at a meeting of a Druids' lodge, of which both he and the plaintiff were members: the defendant having read the letter himself, then, by leave of the chairman, read it aloud to the members present; it was held that reading the letter aloud as above stated, constituted a publication (z).

Publication in ignorance. Where a libel, contained in a letter, folded, but not sealed, was delivered to a third person, to be conveyed to the plaintiff, and was so conveyed without having been read by any one, it was held that no action could be supported (a). But where the

(s) *Armitage v. Dunster*, 4 Doug. 291. 2 Stark. 245.

(t) *Edwards v. Wooton*, 12 Rep. 35.

(u) 1 Will. Saund. 132, n. 2; *Phillips v. Jansen*, 2 Esp. C. 624; and see *Hicks's case*, Hob. 215; *R. v. Wegener*,

(x) *R. v. Wegener*, 2 Stark. 245.

(y) *Lamb's case*, 9 Co. Rep. 59.

(z) *Forrester v. Tyrrell*, 57 J. P. 532.

(a) *Clutterbuck v. Chaffers*, 1 Stark.

defendant, knowing that letters addressed to the plaintiff were usually opened and read by his clerk, wrote a libellous letter and directed it to the plaintiff; and his clerk received and read it: it was held, that there was a sufficient publication to support the action (b). CHAPTER XVI.

Where a witness, in an action of libel, stated, that having heard that the defendant had a copy of the print of a caricature (alleged to be libellous), he went to the defendant's house, and requested to see the print; on which the defendant produced it, and pointed out the figure of the plaintiff and the other persons ridiculed: it was ruled, by Lord Ellenborough, C.J., that this was not sufficient evidence of publication to support the action (c).

The managing director of a limited company, in the ordinary course of business, dictated a libellous letter to their shorthand clerk, who then type-wrote it, and after signature by the managing director, handed it to another clerk to make a press copy: it was then sent by post addressed to the firm of which the plaintiff was a member, and upon delivery was opened and read by the clerks to the firm: it was held, that there was publication—first, to the clerks of the defendant company, and secondly, to the clerks of the plaintiff's firm—and that neither occasion was privileged (d). Libellous letters dictated to and copied by Clerks.

A distinction was, however, drawn between communications of the kind in mercantile transactions and those in professional matters by solicitors, it being no part of a merchant's business to write a defamatory letter, and then have it copied by his clerks; but in the case of a solicitor duly instructed by a client to write and press for payment of money, and to threaten legal proceedings in default, the case is different. And accordingly, where a firm of solicitors, acting in behalf of a client, wrote and sent to the plaintiff a letter containing defamatory statements of her; the letter had first been dictated to their shorthand clerk, then transcribed and handed to a copying clerk who copied it into the letter-book. In an action of libel against the solicitors, for the publication to their clerks, it was held, that the intermediate communication of the contents of the letter to the defendants' clerks was reasonably

471; *Day v. Bream*, 2 Moo. & Rob. 54; *Chubb v. Flannagan and Emmens v. Pottle*, *infra*, p. 270.

(b) *Delacroix v. Therenot*, 2 Stark. 63; and see *Ahern v. Maguire*, A. M.

& O. 39, per Brady, C.B.

(c) *Smith v. Wood*, 3 Camp. 323.

(d) *Pullman and another v. Walter Hill & Co., Ltd.* (1891), 1 Q. B. 524; 60 L. J. 299.

CHAPTER XVI. necessary and usual in the discharge of their duty to and in the interest of their client, and the occasion was therefore privileged (e). And, accordingly, the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it (f). If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business (g). But a communication which would be privileged if made by letter, becomes unprivileged if sent through the telegraph office; because it is necessarily communicated to all the clerks through whose hands it passes. And accordingly, where, a message was telegraphed from one railway station to another, to the effect that a certain bank had stopped payment, it was held libellous (h).

Publication by
Telegraph.

By Post-card. And so also with regard to communications by uninclosed post-cards, which are open to reading by post-office clerks, postmen, servants at the house where delivered, and by all persons through whose hands they pass in the course of transmission from those of the writer until delivered to the person to whom addressed; and therefore, if there be anything defamatory upon them, the person so sending such will be held liable in libel for the publication (i). Where a tradesman transmitted through the Post Office a post-card, on the back of which he stated his account as for goods supplied, giving credit for a payment on account, and showing a small balance due; beneath which he wrote—"Your plea of illness for not paying this trifle is mere moonshine. We will place the matter in our solicitor's hands, if we have not stamps by return, if it cost us ten times the amount." It was held, that although this might have been privileged if sent to the plaintiff by letter enclosed in an envelope; yet, being sent openly on the back of a post-card, it was a libel. That post-cards were intended to be the vehicle of ordinary communications, not of defamatory matter (k). But if the matter written upon the post-card would not be understood by the persons through

(e) *Boxsius v. Goblet Frères and others* (1894), 1 Q. B. 842; 63 L. J. 401.

(f) *Edmondson v. Birch & Co.*, 1 K. B. (1907), 371, C. A.

(g) Per Fletcher Moulton, L.J., in the same, p. 382.

(h) *Whitfield and others v. S. E. Ry.*

Co., E. B. & E. 115.

(i) *Williamson v. Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161.

(k) *Robinson v. Jones*, Ir. L. R. 4 Ex. Div. 391; *McCann v. Edinburgh Roperie Co.*, L. R. (Ir.) 28 Q. B. D. 24.

whose hands it passed as referring to the plaintiff, there will be no evidence of the publication of a libel of him (l). CHAPTER XVI.

The publication of a libel may be *directly* proved, by evidence that the defendant, with his own hand, distributed it or exposed its contents or painted an ignominious sign over the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule; or by evidence of his maliciously reading or singing the contents of the libel in the presence of others; all of which facts are direct proof of the averment that the defendant published the alleged libel (m). Direct proof of publication.

But it frequently happens that no direct proof can be given of the defendant's agency in the publication, and resort must then be had to indirect evidence, in order to connect him with the libel and fix him with its publication. The most usual and important evidence for this purpose, consists in proving that the libel published is in the handwriting of the defendant: when the plaintiff has proved this, he has made out such a *prima facie* case as entitles him to have the contents read in evidence (n). Indirect proof.

A defendant has been held liable for the publication of a libel which by mistake was directed and posted to the plaintiff's employer, instead of to the plaintiff himself (o). But Lord Campbell, C.J., in a subsequent case, declined to express an opinion whether or not an action could be sustained if a gentleman, asked by letter for the character of a servant, should *bonâ fide* write an answer stating acts of dishonesty and immorality committed by the servant, and by mistake address it to another person different from the inquirer, though of the same name (p). It has, however, been held, that an accidental publication (under similar circumstances), would not, in the absence of express malice, be sufficient to render the defendant liable (q). Accidental publication.

It was observed by a great authority, that when a libel is produced, written in a man's own hand, he is taken in the *manner*, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him (r). Libel in the handwriting of Defendant.

(l) *Sadgrove v. Hole*, C. A. (1901), 2 K. B. 1.

(m) 5 Rep. 125; 9 Rep. 59 b; *It. v. Benfield and another*, 2 Burr. 980.

(n) Burr. 2689.

(o) *Fox v. Broderick*, 14 Ir. C. L. Rep. 453.

(p) *Harrison v. Bush*, 5 E. & B. 350. See *Brett v. Watson*, *supra*, p. 169; and *Shepherd v. Whitaker*, L. R. 10 C. P. 502.

(q) *Tompson v. Dashwood*, 11 Q. B. D. 43; 52 L. J. 425.

(r) Per Holt, C.J., in *R. v. Beare*,

CHAPTER XVI. The grounds of this presumption are plain and reasonable.

No man incurs any civil responsibility by what he thinks or even writes, unless he divulge his thoughts to the temporal prejudice of another ; but it seems to be equally clear, in point both of law and expediency, that if he write what is false, and the calumny become public to the detriment of its object, he is just as responsible for the effects of his negligence as if he had been the voluntary publisher of the scandal. And if a man write libels for his own perusal, he must be content to enjoy the satisfaction, diminished by the risk and peril of an *accidental publication* and its consequences.

As to how far
a libel in the
handwriting of
Defendant is
evidence of
publication.

If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published ; such is evidence to go to the jury that it was published by the defendant, although there be no evidence to show that the printing and publication were by the direction of the defendant (*s*). And where a libel had been inserted in a newspaper, a manuscript in the handwriting of the defendant, found at the house of the publisher, was allowed to be given in evidence ; notwithstanding that parts of it had been erased and omitted in the newspaper ; the erased passages not being such as qualified the libel (*t*).

The writing a libel does not, in any case, amount to a publication, but is mere evidence from which it may be inferred (*u*). What amounts to a publication is usually a question of fact falling within the province of the jury to decide (*x*) ; that is, it is a question for the jury, in doubtful cases, whether there has in fact been any publication of the libel to a third person ; but where the facts are clear, the question of publication is one of law for the decision of the court. If (in an action for damages) the facts were that the defendant had posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication ; but if it were doubtful whether, before it was taken down, some one had not read it, that would be a question of fact for the jury (*y*). Though proof that the libel is in the handwriting of the party, goes

12 Mod. 221 ; 1 Lord Raym. 417 ; and see *Mullett v. Hulton*, 4 Esp. 248.

(*s*) *R. v. Lovett*, 9 C. & P. 462 ; and see *Bond v. Douglas*, 7 C. & P. 626.

(*t*) *Tarpley v. Blabey*, 2 Bing. N. C. 437.

(*u*) *Lamb's case*, 9 Rep. 59 ; 15 Vin.

Abr. 91 : Mod. 813.

(*x*) *Baldwin v. Elphinstone*, 2 Sir W. Bl. R. 1037.

(*y*) See Starkie on Evidence, tit. Law and Fact ; *Delacroix v. Thetentot*, 2 Starkie's C. 63 ; *Clutterbuck v. Chaffers*, 1 Stark. C. 471.

far in fixing him with the publication, he is still at liberty to rebut the strong presumption thus raised against him, by reconciling the fact with his innocence. CHAPTER XVI.

The best evidence to prove the handwriting in question, is that of a witness who actually saw the party write it: such direct evidence can, however, seldom be procured; and, in general, to prove the handwriting of a person, any witness may be called who has by sufficient means acquired such a knowledge of the *general character* of the handwriting of the party, as will enable him to swear to his *belief* that the handwriting in question is the handwriting of that person (z). This knowledge of the general character of the party's handwriting, may have been acquired from having seen him write, although but once (a), or, if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the handwriting from a correspondence with the party upon matters of business, or from any other transactions between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent to a particular person, on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be (b).

If a witness be called and asked if he has ever seen the party write, and he answer in the affirmative, the subsequent question as to whether he believes the paper produced and shown to him to be in the same handwriting, may then be put. Whether the witness has seen the party write more or less frequently, affects the weight but not the admissibility of the evidence. If the witness has *ever* seen the party write, it is enough to introduce the subsequent question, whether he believes the paper produced to be in the same handwriting; and if the witness answer "he believes it to be so," that is evidence to go to the jury. "You might call one who had not seen him write for twenty years; and if he said he believed it was the writing of the person, that evidence might go to the jury; but to be affected by all the rest of the evidence; as it is the nature of all evidence to be more or less convincing" (c).

Best evidence
of handwriting.

Witnesses who
have seen the
party write.

(z) B. N. P. 236; *Lord Ferrers v. Shirley*, Fitzg. 195.

(a) *Garrells v. Alexander*, 4 Esp. C. 37.

(b) Per Lord Kenyon in *Carey v. Pitt*, Peake's L. E. 105.

(c) Per Lord Eldon in *Eagleton v. Kingston*, 8 Ves. 473.

CHAPTER XVI.

Evidence of
handwriting by
comparison.

Statutes as to.

Proof of libel
by specimens
of peculiarity
and similitude
of orthography.

As to the
evidence of
experts.

By the C. L. P. Act, 1854 (*d*), comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. This enactment is applicable only to courts of *civil* procedure. But by a subsequent statute "for Amending the Law of Evidence and Practice on Criminal Trials" (*e*), its provisions are re-enacted, and extended to courts of criminal judicature.

Where the object is to prove a peculiar mode of spelling a name or other word, letters and other specimens, though not in evidence in the cause, if proved to be in the same handwriting, are admissible in order to prove the peculiarity of the orthography (*f*), and as evidence of the authorship of the libel.

Where a witness whose handwriting is in dispute, is present in court, such person may be required by the court to write in its presence, and such writing may be treated as evidence in the cause, and be compared with the document in question (*g*).

The evidence of experts, derived from comparison of handwriting, is, at the best, but unsatisfactory testimony. It was observed by Patteson, J., in a well-considered case that "the comparison even of an admitted fair specimen, with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison; some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste or deliberation, with which the same person writes at different times." And the same learned judge observed, that in his opinion the "knowledge of the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person called by one side or the other with a particular object" (*h*).

(*d*) 17 & 18 Vict. c. 125, s. 27.

(*e*) 28 & 29 Vict. c. 18, s. 8.

(*f*) *Brookes v. Tichborne*, 5 Ex. 929;
20 L. J. Ex. 69.

(*g*) *Doe d. Derine v. Wilson*, 10
Moo. P. C. C. 502, 530.

(*h*) *Doe d. Mudd v. Suckermore*, 5
A. & E. 735.

With regard to scientific evidence generally, a witness cannot in strictness, be asked his opinion as to the very point the jury have to determine (i); nor any question as to which the witness would have to draw a conclusion of fact as well as give an opinion upon it (k). But he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true (l).

CHAPTER XVI.

As to scientific evidence generally.

The mere delivery at the Post Office of a sealed letter enclosing a libel has been held to constitute a publication in law (m). If a letter be sent by the post, it is *primâ facie* proof, until the contrary be shown, that the person to whom it is addressed received it in due course (n). The transmission of a letter, by a defendant to his correspondent abroad, reflecting on the plaintiff's character as a merchant, has been held a sufficient publication (o).

Publication by Letter.

All preliminary questions of fact upon which the admissibility of evidence depends, are for the judge at Nisi Prius, not the jury. And where, in order to prove the publication of a libel, the plaintiff tendered secondary evidence of the contents of a letter, alleging it to be the original, which the plaintiff denied; it was held, that the judge, at that stage of the cause, was bound to hear evidence, *pro* and *con*. the originality of the letter, and decide the question without reference to the jury (p).

Letter, originality of, when a question for the judge.

Addressing a libellous letter to a man's wife reflecting upon her husband's conduct, is a *publication* of a libel upon the husband (q). But whether the sending a libellous letter to the husband, reflecting upon the wife, would be a sufficient publication to sustain an action seems doubtful (r). At all events, it would be sufficient to sustain an indictment.

To wife, of libel on husband. To husband, of libel on wife.

If a husband write a libel and hand it to his wife, and she hand it to the person libelled, such is no publication to sustain an action for libel against the husband and his wife; they being but one person in law (s).

Husband and wife, publication by.

(i) *M'Naghten's case*, 10 Cl. & Fin. 200.

(k) *Sills v. Brown*, 9 C. & P. 604, per Coleridge, J.; and see *Jameson v. Drinkald*, 12 Moore, 148.

(l) Per Coltman, J., in *Fenwick v. Bell*, 1 C. & Kir. 312; and per Abbott C.J., in *Malton v. Nesbit*, 1 C. & P. 72.

(m) *R. v. Burdett*, 4 B. & Ald. 95. (per three justices, the fourth *dubitante*).

(n) *Warren v. Warren*, 1 C. M. & R. 250.

(o) *Ward and another v. Smith*, 6 Bing. 749.

(p) *Boyle v. Wiseman*, 11 Ex. 360; 24 L. J. Ex. 284.

(q) *Wenman v. Ash*, 13 C. B. 836; 22 L. J. C. P. 190; 17 Jur. 579.

(r) See the judgment of Jervis, C.J., 22 L. J. C. P. 192.

(s) *Wennhak v. Morgan and wife*,

CHAPTER XVI.

Publication by
authority of
another.

A man who authorises, requests, or employs another to write and publish a libel is responsible criminally as well as civilly, for the libel published in pursuance of such authority, request, or employment. And if a man give authority to another to publish a libel of a certain person, on a certain subject, he cannot afterwards defend himself on the ground that the publisher has added comments of his own, if the libel published be substantially identical with that of which he authorised the publication (t) : for a man who authorises or employs another, generally, to write and publish a libel, must take his chance of what is published. And though the publisher may have deviated from his authority, the employer will nevertheless be liable civilly, though, in that case, he may not be criminally responsible.

By an Agent,
Porter, Carrier,
or Servant.

A defendant may be guilty of publishing a libel not only by distributing copies of it with his own hand, but also by employing an agent for the purpose (u). But a porter or carrier, who in the course of his business delivers a parcel containing libellous handbills, is not liable to an action for the publication of the libels, if it be shown that he was wholly ignorant of the contents of the parcel ; but being *prima facie* liable, it is for him to prove such ignorance (x).

By News-
vendor in
ignorance of
contents.

And where a news-vendor in the ordinary course of his business, sold copies of a newspaper containing a libel ; but it was expressly found by the jury that he did so without knowing, and without negligence in not knowing, that it contained such ; and that the newspaper was not one of such a character as to be likely to contain libellous matter ; it was held, upon these findings, that the news-vendor was not liable to an action for such publication of the libel (y).

Innocent loan
of a newspaper
containing
defamatory
matter.

And if a person innocently hands over, or lends, a newspaper to a friend, with no knowledge that it contains anything defamatory of another, such would not be a publication by such lender of the defamatory matter contained in the newspaper (z).

Book in a
circulating
Library con-
taining a Libel.

But where the proprietors of a circulating library, had copies of a book containing a libel, which they circulated, but

20 Q. B. D. 635 ; 57 L. J. 241 ; and
vide Lefroy v. Cridland, 24 L. T. (O. S.)
60, 96, 216.

(t) See *The Queen v. Cooper*, 8 Q. B.
533.

(u) 7 East, 65 ; Bac. Ab. tit. Libel,
458 ; *Edwards v. Wooton*, 12 Rep. 35.

(x) *Day v. Bream*, 2 Moo. & Rob.
54 ; *Chubb v. Flannagan*, 6 C. & P.
431.

(y) *Emmens v. Pottle & Son*, 16
Q. B. D. 354 ; 55 L. J. 51.

(z) See *McLeod (App.)*, *St. Aubyn*
(*Resp.*) (1899), A. C. 549, 562.

did not know that it contained such : at the trial of the action CHAPTER XVI. they failed to show that it was not through negligence on their part that they did not know that the book contained a libel when they circulated it: it was held, that they were liable as publishers of the libel (a).

As to the liabilities incurred by booksellers, newspaper-proprietors, and publishers, for the publication of libellous matter contained in books, newspapers, &c., printed or sold for their profit or advantage, by their servants and agents; though in the absence, and without the knowledge, sanction, or authority of their principals: such booksellers, proprietors and publishers respectively, are liable to *an action for damages for any such publication*: and it is no answer to the action that they were ignorant of the contents of such book, or other publication; nor that the same was published without their sanction or authority; for a man who carries on a trade or business, or who shares in the profits thereof, must take care that such trade or business is not conducted so negligently as to cause injury to others. But booksellers, newspaper-proprietors, and publishers are not liable *criminally* unless they authorised, sanctioned, or procured the publication of the libellous matter; or were otherwise cognizant thereof, or guilty of a want of ordinary care or caution in the conduct of their business, tending to the publication of such libellous matter (b).

Booksellers,
Newspaper-
proprietors and
publishers,
civil liabilities
for the acts of
their Servants
or Agents.

The sale of every separate copy of a libel is a distinct publication (c). And the publication will be sufficient to sustain an action, though proof can only be adduced of the sale of one copy of the libel to an agent of the plaintiff's sent expressly by the plaintiff to purchase a copy (d).

Sale of every
separate copy
a distinct
offence.

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant, and the consequent publication (e).

Procuring the
publication of
a libel:

For the purpose of proving that the defendant had caused and procured a libel to be inserted in a newspaper, the evidence was, that the reporter put something in writing from his conversation with the defendant, and gave it to the editor.

(a) *Vizetelly v. Mudie's Library*, L. J. 113.
C. A. (1900), 2 Q. B. 170.

(c) *R. v. Carlile*, 1 Chitty, 453.

(b) See as to "Criminal Responsibility," *infra*, and *The Queen v. Holbrook and others*, 4 Q. B. D. 42; 48

(d) *Duke of Brunswick v. Harmer*,
14 Q. B. 185.

(e) *R. v. Johnson*, 7 East, 65.

CHAPTER XVI. *Abbott, L.C.J.*, ruled that what the reporter published in consequence of what passed with the defendant, might be considered as published by the defendant, but it must be shown that what was published was that which was given to the editor by the reporter, which could only be done by producing the written statement itself (*f*). And a manuscript in the handwriting of the defendant, addressed to the editor of a newspaper, and sent to the office of the paper, is evidence to show that the defendant intended the article to be published in that paper (*g*).

or requesting
another to
publish such.

Where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own ; the man making the request is liable to an action as the publisher. If the law were otherwise it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents (*h*).

Proof of publi-
cation in
actions against
printers,
proprietors,
and publishers,
of newspapers.

As to proofs of publication, with reference particularly to actions for libel against the printers, proprietors, and publishers of newspapers and other periodicals.

Register of
Newspaper
Proprietors.

By the "Newspaper Libel and Registration Act, 1881" (*i*), a register of the proprietors of newspapers has been established. And, in pursuance of that statute, it is now the duty of the printers and publishers for the time being, of every newspaper, to make, or cause to be made, to the Registry Office annually, in the month of July in every year, a return, according to the schedule A. thereunto annexed, of the title of the newspaper ; and of the names of all the proprietors of such newspaper, together with their respective occupations, places of business (if any) and places of residence (*k*). And every such return, made in conformity with the Act, is to be registered in a book kept for that purpose at the Registry Office, called "The Register of Newspaper Proprietors" (*l*).

(*f*) *Adams v. Kelly, Ry. & Moo.* 137.

(*g*) *Bond v. Douglas*, 7 Car. & P. 626, per Lord Abinger, C.B. ; and see *Burdett v. Abbott*, 5 Dow. 201.

(*h*) *Parkes v. Prescott and another*, L. R. 4 Ex. 169 ; 38 L. J. Ex. 105.

(*i*) 44 & 45 Vict. c. 60, ss. 8, 9 and

13.

(*k*) The office established under this Act for the registration of newspapers and names of proprietors. is at the Joint Stock Companies Registration Office, Somerset House, London.

(*l*) Sec. 13. As to the penalties for neglecting to make annual returns,

By section 18, the provision as to the registration of news- CHAPTER XVI.
 paper proprietors, is not to apply to the case of any newspaper Joint Stock
Company
proprietors.
 which belongs to a joint stock company duly incorporated under
 and subject to the provisions of the Companies Acts, 1862 to 1879.

By the same statute (section 1), the word "newspaper" is "Newspaper,"
meaning of.
 defined to mean "any paper containing public news, intelli-
 gence, or occurrences, or any remarks or observations therein
 printed for sale, and published in England or Ireland periodi-
 cally, or in parts or numbers at intervals not exceeding twenty-
 six days between the publication of any two such papers,
 parts, or numbers. Also any paper printed in order to be dis-
 persed, and made public weekly or oftener, or at intervals not
 exceeding twenty-six days, containing only or principally adver-
 tisements" (*m*). And by the "Law of Libel Amendment Act,
 1888" (*n*), in the construction of that Act the word "newspaper"
 is to have the same meaning as in the Newspaper Libel and
 Registration Act, 1881.

By section 1 (*o*), the word "proprietor" shall mean and in- "Proprietors,"
who are.
 clude as well the sole proprietor of any newspaper, as also in
 the case of a divided proprietorship the persons who, as
 partners or otherwise, represent and are responsible for any
 share or interest in the newspaper as between themselves and
 the persons in like manner representing or responsible for the
 other shares or interests therein, and no other person.

By section 7 (*p*), where in the opinion of the Board of Trade, "Repre-
sentative
proprietors."
 inconvenience would arise or be caused in any case from the
 registry of the names of all the proprietors of the newspaper
 (either owing to minority, coverture, absence from the United
 Kingdom, minute sub-division of shares, or other special cir-
 cumstances) it shall be lawful for the Board of Trade to autho-
 rise the registration of such newspaper in the name or names of
 some one or more responsible "representative proprietors" (*q*).

and for wilful misrepresentation in, or
 omission from, any such return, see
 ss. 10 and 12.

(*m*) See a decision under the former
 statute (6 & 7 Wm. 4, c. 76) as to a
 paper published at intervals exceeding
 twenty-six days. *Attorney-General v.*
Bradbury and another, 21 L. J. Ex.
 12.

(*n*) 51 & 52 Vict. c. 64, s. 1.

(*o*) 44 & 45 Vict. c. 60.

(*p*) *Ibid.*

(*q*) As to this section, the registrar
 has issued the following instructions

as to the registration of a portion only
 of the names of the proprietors, in
 those cases in which it would be incon-
 venient within the meaning of the
 section to register the names of all
 the proprietors :—"Where it is desired
 to make a return of 'representative
 proprietors' under s. 7, a statement
 should be sent to the registrar, setting
 forth the circumstances which render
 it inconvenient to register the names
 of all the proprietors, and giving such
 information as will show that the pro-
 posed representatives are well able to

F.S.

T

CHAPTER XVI.

Certified copies
of entries
conclusive
evidence of
proprietorship.

By section 15 of the Act of 1881, it is enacted, that every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown (r).

Secondary
Evidence of
contents of a
Paper contain-
ing a Libel.

Evidence may be given to prove that a copy of a newspaper containing a certain libel had been sent gratuitously to a public reading-room in the parish where the plaintiff resided, and upon proof being given of the loss of such copy, secondary evidence may be given of its contents (s). Where the libel was contained in a pamphlet, a witness was called who proved that she had received a copy from the defendant, that she read portions of it, and lent it to several persons, that a copy was afterwards returned to her, which she believed to be the same that she had previously received from the defendant, but would not positively swear to it, though she had no reason to doubt it; and such was held sufficient evidence of publication to go to the jury (t).

Where printed
Libel destroyed
evidence of a
corresponding
one admissible.

Evidence sufficient to go to the jury as to the publication of a libel, is furnished by proof that a libel was actually published, that it was a printed paper since destroyed, that it corresponded with a printed paper produced, and that the defendant printed a paper corresponding with that produced and sent three hundred to a shop from whence a person actually publishing the libel procured it; and that the libel was on that occasion taken from a parcel apparently containing three hundred (u). And where the defendant, after the publication of a libel, but before action, destroyed the letter containing the libellous words; it was held, that as the defamatory writing was not in existence, secondary evidence might be given of the contents of the letter by witnesses who had heard it read: but

meet any claims that may arise for libel, or otherwise, in connection with the management of the paper."

(r) 44 & 45 Vict. c. 60.

(s) *Gathercole v. Miall*, 15 M. & W.

319.

(t) *Fryer v. Gathercole*, 4 Ex. 262.

(u) *Johnson v. Hudson and another*,

7 A. & E. 233.

that the actual words used, as laid in the declaration, must be proved; and that it was not sufficient to prove the substance or impression of the witnesses as to the words; as otherwise the witnesses, and not the court or jury, would be made the judges of what was a libel (x).

Where the defendant, having exhibited a libellous paper, retains it in his possession; if after notice to produce it, he refuse, parol evidence may be given of its contents (y).

Secondary evidence after Notice to produce the Paper containing the Libel.

Where the plaintiff's attorney served the defendant's attorney at the assize town on commission day, with notice to produce a certain paper; none of the parties lived in the assize town; but the expenses of going to fetch the paper were offered to the defendant's attorney, who said that it was of no use, as the paper required was not in existence. It was ruled, that the plaintiff might, on the trial, give secondary evidence of the contents of the paper; as the statement of the defendant's attorney that the paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce (z).

Secondary evidence may be given of the contents of a letter alleged to contain a libel written by the defendant, where such letter is in the possession of a party who refuses to produce it, and is beyond the jurisdiction of the court. But it is no ground for admitting such evidence of the contents of a private letter, that the person who has possession of the letter is beyond the jurisdiction of the court, and has refused to deliver it up when requested so to do by a person who did not disclose the purpose for which it was required (a).

Where libel in possession of a person who refuses to produce it.

Where a witness, who had heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words (b); and if the words have not been written immediately, the witness may refer to his minutes to refresh his memory (c). But not to a copy of such minutes or memoranda; for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory (d).

Notes and memoranda to refresh memory as to words spoken.

(x) *Rainy (App.) & Bravo (Resp.)*,

1 L. R. 4 P. C. 287.

(y) See *Le Merchant's case*, 2 T. R. 201; also *Layer's case*, 6 St. Tr. 229.

(z) *Foster v. Pointer*, 9 C. & P. 718, per Gurney, B.

(a) *Boyle v. Wiseman*, 10 Ex. 647;

24 L. J. Ex. 160.

(b) Per Holt, C.J., in *Sandwell v. Sandwell*, Holt, R. 295.

(c) *Ibid.*, 295.

(d) *Burton v. Plummer*, 2 A. & E. 343.

CHAPTER XVI.

Application
of the
defamatory
matter to the
Plaintiff.

Evidence of the application of the Slander or Libel to the Plaintiff; and proof of the Innuendoes.—Having proved the act of speaking the words or publishing the libel, the next step is to prove their application to the plaintiff. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant, as alleged in the statement of claim. As such evidence is simply as to a result or conclusion which the witness may have derived from a great variety of circumstances; it is sufficient if, in the first instance, he state his belief and opinion as to the defendant's meaning generally, without disclosing his reasons; leaving it to the defendant, if he think proper, to inquire by cross-examination, as to the means and grounds which the witness had for forming that conclusion.

Unless it either appears from the defamatory matter itself, or by extrinsic evidence, that the libel or slander applies to the plaintiff, the action cannot be sustained.

Where the plaintiff is actually named in the libel, or is otherwise referred to, no difficulty can arise as to its application. But where the libel is covertly expressed, or ambiguously worded, evidence is required to show that the plaintiff is the party to whom it applies, or was intended to apply (*e*). But whatever the intention, if the jury find that any person to whom it was published would understand it as applying to the plaintiff, that will be sufficient to sustain the verdict (*f*). Where a libel is covertly, or ambiguously worded but nevertheless applies, or was meant to apply, to the plaintiff, the evidence of persons who read the libel, and knowing the plaintiff, believed and understood it to apply to him, is admissible at the trial to prove that he was the person libelled (*g*).

Where the libellous matter, although alleged to have been published "of and concerning the plaintiff," did not on the face of it appear to relate to him; and there was no innuendo to connect it with the plaintiff: it was held, on writ of error, after verdict for the plaintiff, that the count was bad (*h*).

Where the words of the libel were, "We would exhort the

(*e*) *Le Fanu v. Malcomson*, 1 H. L. Cas. 637, 664.

(*f*) *Ibid.*, and see *Wakley v. Healey*, 7 C. B. 605.

(*g*) See *F'Anson v. Stuart*, 1 T. R.

748; *Bourke v. Warren*, 2 C. & P. 307, per Abbott, L.C.J.

(*h*) *Clement v. Fisher*, 7 B. & C. 459.

medical officers to avoid the traps set for them by desperate adventurers (innuendo, thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute"; the jury have found that the words were intended to apply to the plaintiff, it was held by the Court of Exchequer Chamber, that they were undoubtedly libellous (i).

The meaning of the defendant, as averred by an innuendo, is a question of fact to be decided by the jury. But it is for the judge to decide, as matter of law, whether the matter complained of will bear the meaning ascribed to it by innuendo; and if the judge is satisfied that it will, the question must then be submitted to the jury whether it actually does bear the meaning so ascribed to it (k). If the libel complained of does not necessarily impute misconduct to the plaintiff, the jury are not bound to adopt either the innuendoes or the opinions of the witnesses (l).

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Meaning of
the Defendant
as averred by
Innuendo.

If the jury reject the innuendo and find that the matter charged is a libel upon the plaintiff, and award him damages thereon, the verdict will be upheld (m).

And where the words are innocent in their primary and natural sense, and do not in their natural and ordinary meaning, convey any libellous imputation upon the plaintiff, the judge will be justified in declining to submit the case to the jury (n). And if the alleged libel, though published by way of advertisement in a newspaper, be such that ordinary readers would not understand it in a defamatory sense, it cannot be made so by an innuendo alleging it to bear a meaning that is not supported by the evidence (o).

Where the words are not in their primary sense defamatory, a plaintiff who has attributed to them a secondary sense, must prove the existence of facts which would show them to be actionable in that sense; and on failure of proof of such facts, it is the duty of the judge to direct the jury that the words do not impute anything defamatory (p).

(i) *Wakley v. Healey*, 7 C. B. 591, 600; and see *Ramadge v. Ryan*, 9 Bing. 335.

(k) *Sturt v. Blagg*, 10 Q. B. 908; *Hunt v. Goodlake*, 43 L. J. C. P. 54.

(l) *Broome v. Gosden*, 1 C. B. 728.

(m) *Fisher v. Nation Newspaper Co. and another* (1901), 2 Q. B. D. (Ir.) 465.

(n) *Capital and Counties Bank v. Henty and others*, 7 App. Cas. 741; 52 L. J. Q. B. D. 232; *Nevill v. Fine Arts, &c., Insurance Co.* (1897), A. C. 68.

(o) *Mulligan v. Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153.

(p) *Ruel v. Tutnell*, 29 W. R. 172; 43 L. T. (N. S.) 507, per Lindley and

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Evidence as to
the meaning of
ambiguous
words.

Where the words spoken or the meaning of the terms employed are ambiguous, and it is doubtful in what sense the speaker intended them, the question is, in what sense the hearers understood them ; and if, where words may have two meanings, the hearers understood them in an actionable sense, the action is maintainable : for the slander and damage consist in the apprehension of the hearers (*q*). And the ordinary sense of the words used (whether written or spoken) is to be taken to be the meaning of the utterer, unless they are explained to import something different to their obvious meaning, by previous occurrences, conversations, or other matters having been introduced. In the absence of any such evidence, a witness cannot be asked the question, "What did you understand by those words?" nor, "What did you understand with reference to such an expression?" The proper course is, first, to lay a foundation for a question of the kind by giving some such evidence as above stated, and then the question may become admissible (*r*). In an action of slander, where bigamy was imputed to the plaintiff in *indirect terms*, Parke, B., in the course of his judgment, said—"The reason why the action lies is, that those persons who heard the slander might infer that the plaintiff had been guilty of a felony, and might make a charge founded upon it ; but if, at the time the words are uttered, there are circumstances which clearly show the words are not used in the sense of imputing a felony, then the charge falls to the ground, and no action will lie" (*s*). And in a subsequent case, it was held, that the utterance of words imputing an indictable offence, is actionable or not according to the sense in which they may fairly be understood by bystanders not acquainted with the matter to which they relate, or which may render them a privileged communication ; and that the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial (*t*).

Secret intent
of utterer
immaterial.

Where the libel was charged in several counts, founded on several paragraphs published in different numbers of a newspaper, covertly imputing to the plaintiff and others, that they had been guilty of "felonious practices" (innuendo,

Lopes, JJ. ; *Francis v. Roose*, 3 M. & W. 191 ; *Clegg v. Laffer*, 3 Moore & Sc. 727.

(*q*) *Fleetwood v. Curley*, Hob. 267.

(*r*) *Daines and another v. Hartley*, 3 Ex. 200 ; 18 L. J. Ex. 81 ; *Simmons v. Mitchell*, 6 App. Cas. 156 ; 50 L. J.

P. C. C. 11.

(*s*) *Heming v. Power*, 10 M. & W. 569, 570.

(*t*) *Hankinson v. Bilby*, 16 M. & W. 445 ; and see *Hughes v. Rees*, 4 M. & W. 204.

unnatural crimes); it was held, that other paragraphs, by the defendant, published in the same newspaper, though at different dates, were admissible in evidence for the purpose of illustrating the meaning of the passages charged as libellous, and of showing that they conveyed an imputation upon the plaintiff that he had been guilty of *unnatural crimes* (u). CHAPTER XVI.

In an action of libel, where the language of the alleged libel is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff, the question for the jury is not as to the intention of the publisher, but whether the tendency of the matter published be injurious to the plaintiff (x); for the law presumes a person to have intended to produce the injury which his act is calculated to effect (y). But the onus lies upon the plaintiff to show that the matter published has a libellous tendency. And if in the opinion of the court there are no facts such as would satisfy the onus, the question should not be submitted to the jury (z). The tendency of the Libel (not the intention) is the question for the Jury.

Where slander is published in a foreign language, it is necessary to show that the hearers understood the language; for it will not be presumed that being ignorant of the words, they afterwards discussed them with persons who understand them (a). And where a libel has been published in a foreign language, it must be shown by means of a sworn interpreter, that the translation set out in the statement of claim is a correct one (b). When published in a foreign language.

In a case in which the libel imputed to an officer in Her Majesty's Customs that he was a Papal rebel, a traitor, and idolater; that he was a member of an association for the conversion of England to the Roman Catholic faith, that he had enlisted himself in the service of a foreign potentate, and was bound never to decline from the purpose of annihilating all religious opinions and beliefs other than the Roman Catholic religion and Popery;—the defendant having pleaded the general Counsel cannot comment upon Matters of Fact not proved in Evidence.

(u) *Bolton v. O'Brien*, 16 L. R. (Ir.) Q. B. D. 97; affirmed by Court of Appeal, *Ibid.*, 483; and see *Brunswick (Duke of) v. Harmer*, 3 C. & K. 10, per Lord Campbell, C.J.; *Barnett v. Allen*, 27 L. J. Ex. 412; 3 H. & N. 376.

(x) *Fisher v. Clement*, 10 B. & C. 472; *Baylis v. Lawrence*, 11 A. & E. 920.

(y) *Haire v. Wilson*, 9 B. & C. 643.

(z) *The Capital and Counties Bank v. Henty and others*, 7 App. Cas. 741; 52 L. J. 232; and *vide O'Hea v. Guardians Cork Union* (1892), L. R. (Ir.) 32 Q. B. D. 629.

(a) P. C. Hob. 268; and see 1 Vin. Ab. 507, and *Gilb. Cas. L. & E.* 117.

(b) *Amann v. Damm*, 8 C. B. (N. S.) 597.

CHAPTER XVI. issue, and a justification as to so much of the libel as imputed to the plaintiff that he was a member of the association, etc.; at the trial the defendant's counsel having intimated his intention of not calling witnesses; it was held, that he could not, in his address to the jury, read, for the purpose of showing the doctrines of the church of Rome, a Papal treaty with a Catholic State; nor canons, decrees, or bulls of that Church, nor the oath taken by Roman Catholic bishops: all those being matters of fact it was necessary to prove them, and the mere fact of finding them stated in certain books and documents did not relieve the defendant from the duty of calling witnesses to prove them (c).

CHAPTER XVII.

DISCOVERY IN ACTIONS OF SLANDER AND LIBEL.

INTERROGATORIES, PRODUCTION AND INSPECTION OF DOCUMENTS, &c.

Effect of Judicature Acts and R. S. C. as to discovery.

Proprietorship of Newspapers.

Discovery by Interrogatories.

Interrogatories in Slander.

The like in Libel.

Interrogatories tending to criminate.

Interrogatories as to names of parties.

Discovery by Inspection: taking copies of the Libel, &c.

As to Inspection by Plaintiff of original Manuscript containing Libel.

Privilege as to Official communications between Public Officers.

State Documents, privilege as to production of.

Communications between Client and legal adviser: privilege as to discovery.

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Effect of Judicature Acts, and R. S. C. as to discovery.

THE procedure as to discovery by interrogatories, and inspection of documents, is regulated by the rules of the Supreme Court, Order XXXI. rr. 1 to 29. But the principles which previously guided the Courts, and the Judge at Chambers, in the exercise of the discretionary powers vested in them as to the allowance and disallowance of interrogatories, and as to the protection from discovery or production of certain privileged documents and communications, remain as before; consequently many of the cases decided under the former procedure still regulate the practice as to discovery in actions of slander and libel; they are therefore retained in the text. And, it

(c) *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.

should be observed, that since the Judicature Acts, the principles upon which the law as to discovery is administered by Courts of Equity, apply also to its administration by courts of law. CHAP. XVII.

Facilities as to the discovery of proprietors of newspapers are afforded by the "Newspaper Libel and Registration Act, 1881" (a), which provides for the registration of the title of newspapers, and the names of all the proprietors thereof; and by section 15, certified copies of entries from such register are to be received as conclusive evidence of the contents of such register; and such certified copies are to be accepted as *prima facie* evidence of all matters and things thereby appearing, unless the contrary be shown. Proprietorship of Newspapers, Certified Copies from Register, evidence of.

It will not, however, be safe in all cases to rely on such certified copies as conclusive evidence of the proprietorship of the newspaper; for the defendant may have transferred his interest therein after registration and before the publication of the libel. And section 11, which permits the registration of such transfers of proprietorship, is not compulsory.

As to Discovery by Interrogatories.—Under the former procedure, there was no peremptory rule as to the time for making the application for leave to administer interrogatories; but the judges would seldom entertain applications of the kind in actions of slander and libel until after issue joined. Under special circumstances, however, they would sometimes in exercise of the discretionary power given them by the C. L. P. Act, 1854, allow interrogatories to be administered before plea, and (in a very exceptional case) even before declaration; but in all such cases it was required that the affidavit on which the application was founded should disclose not only the cause of action, or nature of the slander or libel, but the *special circumstances* on which the plaintiff relied in support of the application; and in the case of a defendant, the nature of his proposed defence, and the special circumstances in support of it (b). If these were such as in the discretion of the judge were sufficiently material at that stage of the action to entitle the applicant to the discovery sought, it was granted; if otherwise it was refused: and the practice as to this remains the same under the present procedure (c). Discovery by Interrogatories, time for.

As to allowance of, before pleading.

(a) 44 & 45 Vict. c. 60.

42 L. J. C. P. 244.

(b) See *Atkinson v. Fosbrooke*, 1 L. R.

(c) See *Mercier v. Cotton*, 1 Q. B. D.

Q. B. 628; 35 L. J. Q. B. 182; and

442; 46 L. J. 184.

Gourley v. Plimsoll, L. R. 8 C. P. 362;

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Further and
better answers.

Where a Divisional Court has held that the answers given to interrogatories are honest, and on the whole complete, the Court of Appeal will not interfere merely on the ground that some particular answer might have been more fully and accurately framed: but where the Court finds that in the answers there is an attempt to *finesse*, and so to evade answering fairly, it will order further and better answers (*d*).

Interrogatories
in *Slander*, as
to the words
uttered.

Where the alleged slander was spoken in a foreign language, the court refused to allow interrogatories as to whether the defendant did not speak and publish the words laid, or any and which of them, or any and what other words, conveying the same or similar imputations against the plaintiff: and as to when, where, and to whom the words laid were spoken and published (*e*). But the defendant may be compelled to answer interrogatories as to the words he uttered, if the plaintiff shows clearly by affidavit (uncontradicted) that he has a case against the defendant, and cannot otherwise obtain redress. So, where it was shown that the defendant imputed forgery to the plaintiff, but the plaintiff was unable to discover from any of the persons who heard the imputation, the precise words used on the occasion, the court allowed interrogatories to be put to the defendant as to the words he uttered (*f*).

Where defen-
dant raises two
defences.

Where the defendant, in answer to plaintiff's statement of claim, denies the speaking of the defamatory words alleged; and adds, that if he spoke them he did so at the invitation of the plaintiff; he thereby raises two separate defences, the latter only of which is a subject for interrogatories, and the defendant cannot escape answering them because of another defence which he has raised on the pleadings (*g*).

Interrogatories
in *Libel*.

In actions of *libel*, interrogatories tending to fix the defendant either as the actual author or publisher of the libel, or with criminal participation in it, will not generally be allowed; nor will those asking for the real name of the author of a book published under a *nom de plume*, nor as to whether or not the defendant was indemnified against the consequences of the libel (*h*). But where there are special circumstances pointing to the defendant as the publisher of the libel, and the plaintiff

(*d*) *Field v. Bennett*, 2 Times L. R. 2 Q. B. 590.
122, and *vide* Ord. XXXI. r. 11.

(*e*) *Stern v. Serastopulo*, 14 C. B. (N. S.) 737.

(*f*) *Atkinson v. Fosbrooke*, 35 L. J. Q. B. 182; L. R. 1 Q. B. 628; and
vide Dalgleish v. Lowther, C. A. (1899),

(*g*) *Barratt v. Kearns*, 1 K. B. (1905), C. A. 504, 506.

(*h*) *Tupling v. Ward and others*, 30 L. J. Ex. 222; *Blanc v. Burrows*, 12 T. L. R. 521.

cannot otherwise prove his case, he may be permitted to administer interrogatories to the defendant as to the publication ; unless criminal proceedings are pending, or appear to be contemplated : and if the defendant objects to answer on the ground that he would criminate himself by so doing, the objection must be taken by affidavit to that effect (*i*). A defendant is not bound to answer interrogatories as to the contents of an alleged libellous letter ; particularly in the absence of positive proof that a letter containing defamatory matter has been published by him, and that the plaintiff has suffered an injury therefrom (*k*) : nor can a defendant be compelled to answer, from memory, an interrogatory as to the contents of a letter of which he has kept no copy, and has no accurate recollection (*l*).

Where the object of the interrogatories was to rebut the defence of privileged occasion, by seeking to prove malice in the defendant, it was held, that the judge exercised a proper discretion in refusing to allow such interrogatories ; as the answers thereto would have enabled the plaintiff to abandon the civil and institute *criminal* proceedings against the defendant (*m*).

According to the general rule of law, that a witness is not bound to criminate himself, no witness is bound to answer a question where the answer may tend to show that he has been guilty of publishing a libel, for which he may be indicted (*n*). But where the defendant is subpoenaed as a witness for the plaintiff, he cannot object to be sworn and examined, on the ground that any relevant questions put to him would tend to criminate himself : the plaintiff has a right to insist on his being sworn ; and he must then answer the questions put to him, or object in the usual way, if he insists on any privilege in that respect (*o*). And the same rule applies to written interrogatories : the party administering them has a right to insist that any objection to answer the interrogatories shall be made upon oath.

As to the right of the party interrogated to decline to answer an interrogatory on the ground that his answer may tend to

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As to malice.

Privilege as to self-criminating testimony.

Interrogatories tending to criminate.

(*i*) *Greenfield v. Reay*, L. R. 10 Q. B. 217 ; 31 L. T. (N. S.) 756. 418 ; *Caryll v. Daily Mail Publishing Co.*, 90 L. T. 307 (C. A.).

(*k*) *Stein v. Tabor*, 31 L. T. (N. S.) 444. (*n*) *Maloney v. Bartley*, 3 Camp. 210.

(*l*) *Dalrymple v. Leslie*, 51 L. J. Q. B. D. 61 ; 30 W. R. 106. (*o*) *Boyle v. Wiseman*, 10 Ex. 647 ; 24 L. J. Ex. 160 ; 14 & 15 Vict. c. 99, ss. 2 and 3.

(*m*) *Davis v. Gray*, 30 L. T. (N. S.)

CHAP. XVII. criminate him ; it is a cardinal principle of the law of England that no man is bound to criminate himself. And therefore, where the interrogatories are such that if answered they have a direct tendency to criminate the party interrogated, as by eliciting from him an admission of the publication of that which is alleged to be libellous ; he may, by his affidavit, decline to answer them, on the ground that his answer might tend to criminate him. Such however is no ground for an application to strike out or disallow the interrogatories (*p*).

In order to support an application to strike out or disallow an interrogatory, the interrogatory itself must be objectionable (*q*). And where the plaintiff interrogated the defendant as to whether he did not publish the alleged libel ; the defendant, in his affidavit, stated—"I decline to answer the said interrogatories, upon the ground that my answer to them *might* tend to criminate me : " it was held, that the answer was sufficient, and that the defendant was not bound to say, that his answer to them *would* tend to criminate him (*r*).

Where
printer's name
not stated
on libellous
handbill.

Where the alleged libel was contained in a printed notice, or handbill, on which the name of the printer did not appear, it was stated in the affidavits that the defendant had been seen with a man who distributed handbills, and was also himself seen to affix one of them to the shutters of a shop. On an application on the part of the plaintiff to be allowed to interrogate the defendant for the purpose of ascertaining if, and to what extent, he gave instructions for the printing and circulation of the handbills, and whether he paid for them wholly or in part ; it was held, that such were special circumstances sufficient to take the case out of the ordinary rule, and to allow of the proposed interrogatories being administered (*s*).

Where the
libel is in an
anonymous
letter.

In an action for a libel contained in an anonymous letter, alleged to have been written by the defendant to a third party, reflecting upon the character of the plaintiff, the defence pleaded being a denial of the publication ; the plaintiff interrogated the defendant as to whether he was not the writer of a certain other specified letter sent to another person ; the object of the interrogatory being, to prove by comparison of

(*p*) *Fisher v. Owen*, 8 Ch. D. 645 ; 678.

47 L. J. 681.

(*q*) *Ibid.* ; and see *Allhusen v. Labouchere*, 3 Q. B. D. 654 ; 47 L. J. Ch. D. 819 ; *National Association Plasterers v. Smithies* (1906), T. L. R.

(*r*) *Lamb v. Munster*, 10 Q. B. D. 110 ; 52 L. J. 46.

(*s*) *Greenfield v. Reay*, 44 L. J. Q. B. 81 ; L. R. 10 Q. B. 217.

handwriting that the defendant was the writer of the letter containing the libel. The defendant objected to answer the interrogatory on the ground of irrelevancy ; but it was held, that the interrogatory must be answered ; that it was relevant, as leading up to a matter in issue in the action, (viz.) the authorship of the libel (t). CHAP. XVII.

But where a series of defamatory libels were published in the form of posters, placards, and slips, purporting to have been printed by "J. Wighton & Co.," and an action having been brought against the supposed firm of "J. Wighton & Co.," and an appearance entered and defence pleaded in that name: it was afterwards discovered that there was no such firm, and that James Wighton, who was put forward to defend the action, was a person in the employ of an actual firm of printers of an entirely different name, one of whom was the publisher of the libels ; interrogatories were administered to the defendant with a view to the discovery of the alleged firm of "J. Wighton & Co." being fictitious, and as to the identity of the actual firm with the printing ; and the defendant having objected, in due form, to answer the interrogatories on the ground that his answer thereto might tend to criminate him ; and on the further ground that the interrogatories were irrelevant and vexatious, a summons for further and better answers was dismissed (u). Bogus firm of printers.

A party to an action of slander or libel is not entitled to discovery of the names of the witnesses by whom the facts are to be proved, unless their names form a substantial part of the material facts in dispute (x). Interrogatories as to names of witnesses, disallowed.

Interrogatories must not be oppressive, and must not exceed the legitimate requirements of the occasion : and therefore, an interrogatory asking for the names of the companies, firms, and persons to whom the publication complained of was supplied, will not be allowed (y).

But where to an action of libel, the defendant pleaded a justification, alleging that the libel was true : the substance of the libel being, that the plaintiff had fabricated a story as to the existence of a circular-letter, purporting to have been signed by the defendant and sent round by him or his firm to the defendant's competitors in business, the plaintiff, in a But allowed as to material allegations of fact.

(t) *Jones v. Richards*, 15 Q. B. D. 439.

(x) *Marriott v. Chamberlain*, 17 Q. B. D. 163 ; 55 L. J. 453.

(u) *Pankhurst v. Wighton & Co.*, 2 Times L. R. 745, cor. Pollock, B., and Cave, J.

(y) *White & Co. v. Credit Reform, &c.*, 1 K. B. (1905), C. A. 653.

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certain speeches and in letters written to the newspapers, had asserted that he had seen a copy of such letter, that he had been informed of its existence by a solicitor of high standing; and that two of such letters were in the possession respectively of an eminent banking firm and a firm of manufacturers at Birmingham. The defendant interrogated the plaintiff as to the name and address of the solicitor in question, as to where and when he had seen the copy letter, and as to the names and addresses of the two firms who were alleged to be in possession of such letters. The plaintiff objected to answer the interrogatories, upon the ground that he intended to call those persons as witnesses at the trial: but it was held, that the defendant was entitled to the discovery he sought, inasmuch as the facts inquired into formed a substantial part of the facts material to the issue raised by the plea of justification (z).

Interrogatories
as to name of
person, &c.,
supplying
defamatory
matter to
Newspaper.

Where the defendant admits his liability for the publication of the libel, the question who was the writer, or author, of the libel, is wholly irrelevant (a). And so, also, where both plaintiff and defendant were proprietors and editors of newspapers, the plaintiff sued the defendant for libel contained in a letter published in the defendant's newspaper reflecting upon the plaintiff in the conduct of his paper: the defendant pleaded a denial of the writing of the libel, but admitted the publication; he also pleaded that the alleged libel did not refer to the plaintiff; and further that he had published an apology. In the apology it was stated that the alleged libel was written by a person who lived at a distance, and who it was believed never saw the plaintiff's paper and had no intention of referring to him. The plaintiff sought to interrogate the defendant as to the name and address of the writer of the letter, and of the person referred to in the apology as living at a distance, &c.: the defendant objected to answer on the ground that, having admitted the publication, and thereby his responsibility for it, the interrogatories were irrelevant. A judge at chambers (Pollock, B.) having made an order requiring the defendant to make further answers; on appeal it was held by the Court (b) that the case was not distinguishable on any valid ground

(z) *Marriott v. Chamberlain*, 17 Q. B. D. 154; 55 L. J. 448.

(a) *Hennessy v. Wright* (No. 2), 36 W. R. 879 (C. A.); *Parnell v. Walter and another*, 24 Q. B. D. 441; 59 L. J. 125; *Mackenzie v. Steinkoff*,

54 J. P. 327; and *vide The Bahama Islands case, infra*, p. 402; *Blanc v. Burrows* (1896), 12 Times L. R. 521.

(b) Lord Coleridge, C.J., and Hawkins, J.

from that of *Hennessy v. Wright* (*supra*); but that it was distinguishable from that of *Marriott v. Chamberlain* (*supra*), and the appeal was allowed (c).

In an action of libel imputing insolvency to a bank (having several branches), which resulted in a run being made upon the bank; particulars were ordered as to the branches on which the run was alleged to have been made, and the period of continuance of the run, but not as to whether the run was made by depositors or by ordinary customers (d).

Where the plaintiff was a candidate for the office of mayor of a borough, and the defendant imputed to him that he had accepted a bribe in a matter that came before the council: the defendant having pleaded that the words, if spoken at all, were spoken in good faith, without malice, and on a privileged occasion; the plaintiff sought to interrogate the defendant as to what information he had which induced him to believe that the words so spoken were true, and what steps, if any, he took before speaking them to ascertain whether they were true or not: on appeal from an order at chambers disallowing the interrogatory, it was held, that the interrogatory should be allowed as relevant to the question of malice and in support of the plaintiff's case (e).

And in subsequent cases it has been held, that an interrogatory asking what inquiries (if any) were made as to the truth of the matter complained of before publishing it, and of whom such inquiries were made, is admissible (f).

But where it was sought to interrogate the plaintiff as to the facts and circumstances on which he relied as showing actual malice, the interrogatory was disallowed (g).

The defendant will not, usually, be permitted to interrogate the plaintiff with a view to the support of a justification pleaded in general terms. And so, where a general plea of justification was allowed subject to the delivery of particulars, the defendant was not permitted to administer interrogatories to the plaintiff for the purpose of enabling him to comply with an order for the delivery of the particulars (h). And in

(c) *Gibson v. Evans*, 23 Q. B. D. 384; 58 L. J. 612.

(d) *London and Northern Bank v. Newnes* (1900), 16 T. L. R. 433.

(e) *Elliott v. Garrett*, C. A. (1902), 1 K. B. 870.

(f) *White & Co. v. Credit Reform, &c.*, 1 K. B. (1905), C. A. 653; *Edmondson v. Birch & Co.* (1905), 2 K. B. 523,

C. A.; *Plymouth Mutual, &c. v. Traders' Publishing Association, Ltd.*, 1 K. B. (1906), C. A. 403.

(g) *Lerer Bros. v. Associated Newspapers*, and *Same v. Pictorial Newspaper Co.* (1907), 23 T. L. R. 652 (C. A.), 2 K. B. 626.

(h) *Gourley v. Plimsoll*, L. R. 8 C. P. 362; 42 L. J. C. P. 244.

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Allegations causing a run upon a Bank.

Whether inquiries made before publication as to truth of alleged libel.

Interrogatories by Defendant in support of justification.

CHAP. XVII. **an action against the proprietors and publisher of the "Times" newspaper for certain alleged libels published in that paper, and in a pamphlet entitled "Parnellism and Crime," the defendants without pleading specifically any denial of the publication, nor any privilege or justification, paid 40s. into court, and pleaded that such was enough to satisfy the plaintiff's claim. The plaintiff sought to interrogate the defendants as to the number of copies issued of the publications containing the libels; and also as to the names of the persons from whom the letters containing the libels were obtained, what money was paid for them, what steps, if any, were taken to verify the statements contained in the said letters, and to test and ascertain the authenticity and genuineness of the same, &c.: the defendants having objected to answer any of the interrogatories; it was held, that they must answer those as to the number of copies issued, as they affected the question of damages and were therefore material to the issue; but as to the other interrogatories, the court was precluded by the previous authorities from holding such to be admissible in an action of libel (i). In a subsequent case in the Court of Appeal, the case of *Parnell v. Walter* was overruled so far as it related to discovery as to the circulation and number of copies printed of the issue of the newspaper containing the libel: and it was held, that such interrogatories were frivolous and vexatious, and that an answer to the effect that a "considerable number of copies" of that issue were printed and published was sufficient (k).**

Interrogatories as to defamatory rumours and prior publication of defamatory matters.

In an action of slander and libel of the plaintiff in his capacity of candidate for the representation in parliament of a constituency, it appeared that the defendant read, in the course of a speech to the electors, and afterwards published in the form of placards, slips, and handbills, extracts from a newspaper containing the report of a speech made by a third party at a public meeting, imputing atheism and blasphemy to the plaintiff. The defendant administered interrogatories to the plaintiff, as to whether he was not aware that prior to the publications in question, persons were making statements as to his religious belief; whether he had not been questioned by certain persons as to such belief; whether the libellous matter had not been previously published in a newspaper;

(i) *Parnell v. Walter and another*,
24 Q. B. D. 441; 59 L. J. 125, cor.
Denman and Wills, JJ.

(k) *Whittaker v. Scarborough Post Newspaper Co.* (1896), 2 Q. B. 148.

whether he had taken any steps to contradict the same; CHAP. XVII.
 whether it was not part of a speech made at a public meeting
 by a certain person (whose name was given); whether he had
 not made statements giving rise to reports and impressions in
 the minds of other persons that his opinions were similar to
 those stated in the alleged libels, upon which the reports
 aforesaid might have been founded. Objection was taken, on
 behalf of the plaintiff, to answer these interrogatories, on the
 ground that they were vexatious and irrelevant, that the
 defendant sought thereby to justify the publication of the
 defamatory matters as idle rumours and repetitions of such
 rumours, and a prior publication thereof in a newspaper: it
 was held, that the interrogatories were inadmissible, and the
 objections to answer them were sustained on the several
 grounds above stated (l).

An infant plaintiff or defendant cannot be compelled to answer interrogatories (m).

Interrogatories asking for particulars of sums of money already recovered in other actions in respect of other publications of the same libel were disallowed (n). Where a defendant has, within the time limited by Ord. XXXVI. r. 37, furnished particulars of matters as to which he intends to give evidence in mitigation of damages, it has been held, that he is entitled to administer interrogatories to the plaintiff as to the matters referred to in such particulars (o).

As to discovery by inspection of the libel or other documents in plaintiff's or defendant's possession.

It has been held, that the power of the court to grant inspection under the statute 14 & 15 Vict. c. 99, s. 6, is limited to cases where, formerly, a bill for discovery in equity could have been maintained (p). An interrogatory as to the discovery of documents need not be limited to such as were in the possession or power of the party interrogated; such party may be interrogated as to what documents relating to the matter in question he ever had in his possession (q).

A defendant in an action of libel has been permitted, by order of a judge, to inspect and take copies, by photograph

Discovery by
Inspection;
taking copies
of the Libel,
&c.

Photographic
copies of the
Libel.

(l) *Pankhurst v. Hamilton*, 2 Times L. R. 682, cor. Manisty and Mathew, JJ.

(m) *Mayor v. Collins*, 24 Q. B. D. 361.

(n) *Tucker v. Lawson*, 2 Times L. R. 593, cor. Denman and Hawkins, JJ.

(o) *Scaife v. Kemp & Co.* (1892), 2 Q. B. 319; 61 L. J. 515.

(p) *Hill v. Campbell and wife*, L. R. 10 C. P. 222; 44 L. J. C. P. 97; and *vide* B. S. C., Ord. XXXI.

(q) *Lethbridge v. Cronk*, 44 L. J. C. P. 381.

CHAP. XVII. or otherwise, of the alleged libels referred to in the declaration (r).

Inspection for purpose of getting up a justification not allowed.

In general a person who ventures to publish a libel or utter slander, is not entitled to ask for an inspection of books and documents in the plaintiff's possession, for the purpose of getting up a justification (s).

But if the defendant have reason to believe that there is some particular document, which he specifies, and which he believes would support his case, or is necessary for his defence; upon satisfying the judge as to all such particulars, the defendant would probably be entitled to an inspection. But a shareholder in a joint-stock company is not entitled to an inspection of the books of the company, for the purpose of getting up evidence to support a plea of justification to a libel published by him, imputing insolvency to the company (t). And where there was a plea of justification imputing dishonesty to the plaintiff whilst in the defendant's employ, the plaintiff was not allowed inspection of statements of accounts furnished by himself of moneys received in the course of such employ, nor of letters from himself to the defendant relating thereto, nor of entries in the defendant's books of moneys received from him so far as they might be material to disprove charges contained in the plea; nor, if the plea was general, so far as they might relate to charges specified in particulars ordered to be delivered by the defendant (u).

As to inspection by Plaintiff of original manuscript containing the alleged libel.

The Court, in the exercise of its discretion, will not, as a general rule, in the absence of any special reason to the contrary, order inspection of the original manuscript containing the alleged libel. And so, in an action of libel against the proprietors of a newspaper, the defendants in their statement of defence, admitted the publication and pleaded an apology and payment into Court; and disclosed in their affidavit of documents, the fact that they had in their possession a manuscript which they objected to produce, on the ground that it was the original manuscript of the alleged libel, of which they had admitted the publication in their statement of defence; it was held, that an order for inspection ought not to be made (x).

(r) *Darey v. Pemberton*, 11 C. B. (N. S.) 628; and *vide Lewis v. Earl of Lonsborough* (1893), 2 Q. B. 191.

(s) *Yorkshire Provident Life Assurance Co. v. Gilbert and Rixington* (1895), 2 Q. B. 148; 64 L. J. 578.

(t) *Metrop. Sal. Om. Co. v. Hawkins*, 4 H. & N. 146. And see *Macaulay v. Shakell*, 1 Bligh, N. S. 96.

(u) *Collins v. Yates and another*, 27 L. J. Ex. 150.

(x) *Hope v. Brash and another*,

But where, by the desire and consent of both parties, and with a view of avoiding the delay and expense of further affidavits, the documents themselves are submitted to the judge at Chambers for his decision, an appeal from the decision of the judge so given will not be permitted (y). CHAP. XVII.

Where the plaintiff (a servant) having brought an action against his former master, for alleged libels contained in certain letters written by such master in reply to inquiries as to the character of the plaintiff : the defendant having admitted, in answer to interrogatories, that he held copies of the letters he had written : on an application for an order for leave to inspect and take copies of such copy letters, it was held, that the plaintiff was entitled to the order. And upon the question as to whether the defendant could refuse to produce them on the ground that their production might tend to expose him to criminal proceedings for libel, the court were clearly of opinion that even if such ground were available to the defendant he could only avail himself of it on such terms as it could avail him in answering interrogatories, or giving other discovery ; viz., upon his pledging his oath that to the best of his knowledge, information, and belief, the production of the copy letters would tend to criminate him. But upon the question as to whether they would then be protected from production, the court declined to express an opinion, preferring to keep their judgments open upon that point ; their opinion upon the question not being necessary for the decision of the case then before them (z). It was also held, in the same case, to be no sufficient objection to the production by the defendant of a document in his possession, alleged to be libellous, that it is a privileged communication : for although a defamatory communication may be privileged in the sense that it is not actionable, because it was made on a privileged occasion ; still that affords no ground of privilege from production and inspection by the plaintiff in an action for an alleged libel contained in it (a).

Inspection of letters written on a privileged occasion.

A party cannot be compelled to answer from memory, an interrogatory as to the contents of a written document not in his possession, and as to which he makes oath that he has no recollection (b).

Discovery as to contents of libel not in party's possession.

C. A. (1897), 2 Q. B. 188 ; and see *Plymouth Mutual, &c. v. Traders' Publishing Association*, 1 K. B. (1906), C. A. 403.

(z) *Webb v. East*, 5 Q. B. D. 108 ; 49 L. J. 250.

(a) *Ibid.*

(b) *Dalrymple v. Leslie*, 51 L. J. Q. B. D. 61 ; 30 W. R. 106.

(y) *Bustros and others v. White*, 1 Q. B. D. 427 ; 45 L. J. 645.

CHAP. XVII.

Where the libel is destroyed.

Before filing declaration, plaintiff gave the defendant notice of his intention to move for a rule for the production of the letter containing the words of the libel as set out in the declaration. An affidavit in answer, by the defendant, stated that he, the defendant, had destroyed the letter ; but made no objection to the terms of the alleged libel set out in the plaintiff's affidavit : it was held, that the plaintiff's affidavit, being merely for the purpose of the production of the letter, was not admissible in evidence to prove the words of the libel (c).

Privilege as to official communications between Public Officers.

Upon principles of public policy, official communications between public officers, as such, upon matters relating to the public service, and the acts, conduct, and capacity, of persons employed in such service, are privileged from disclosure in courts of law (d).

State Documents, privileged as to production of.

State papers, and other documents relating to the public service, are, on grounds of public policy, privileged from inspection, and production in courts of law ; when such inspection or production would be prejudicial to the State, the public service, or the public interests. And accordingly, it has been held, that if the production of a state paper would be injurious to the public service, the public interest must be considered paramount to the individual interest of a suitor in a court of justice ; therefore, if the head officer of the department, having the custody of the document, refuse to produce it on that ground, a judge has no power to compel him (e).

And reports made in the discharge of the duties of their respective offices, by Government officials, to the Crown, or its representatives, are State documents ; and their production in a court of justice, at the suit of a particular individual, cannot be enforced (f).

Letters by private persons to public officers.

But letters by *private individuals* complaining of the conduct of public servants, written to persons in a superior capacity as public officers, whether of the Government or otherwise, are not privileged from disclosure on the mere ground that they are official communications (g).

Communications between Client and legal adviser : privilege as to discovery.

As to the rule which protects from production or discovery confidential communications between a client and his legal

(c) *Rainy (App.) and Bravo (Resp.)*, L. R. 4 P. C. 287 ; 20 W. R. 873.

(d) *Earl and others v. Vass*, 1 Shaw, App. Cas. 229 ; Boyd Kinnear's Dig. H. L. Cas. 226.

(e) *Beatson v. Skene*, 4 H. & N. 839 ; 29 L. J. Ex. 430.

(f) *M'Elreney v. Connellan*, 17 Ir. C. L. R. 55 ; *Fitzgibbon v. Greer*, Ir. R. 9 C. L. S. 294 ; *Stace v. Griffith*, L. R. 2 P. C. 420 ; *Hennessy v. Wright*, 21 Q. B. D. 509 ; 57 L. J. 530.

(g) *Blake v. Pilfold*, 1 Moo. & Rob. 198, per Taunton, J.

adviser ; the old rule was, that every document in the possession of a party to the suit must be produced if it was material or relevant to the issue, unless it was covered by some established privilege: and then it was established that communications that had passed between a client and his solicitor were privileged ; and not only communications from the client to his solicitor, but from the solicitor to the client. The principle upon which this rule was based is,—that you have no right to see your adversary's brief, nor the materials for the brief (*h*).

The general principle that communications made to and by a solicitor, in the regular course of professional employment, are privileged from discovery, extends to the case of a solicitor, personally a defendant in an action, who is called upon to answer interrogatories, the answers to which would disclose facts and information obtained by him in his confidential capacity as solicitor for a client in another action (*i*). And it was held, that the privilege claimed in such case, is not that of the solicitor, but that of his client (*k*). And so also, the draft of an advertisement submitted to, and to be settled by counsel, with a view to publication in a newspaper, is privileged from production to a defendant in an action for an alleged libel contained in such advertisement: such a document being within the rule as to professional privilege laid down in the preceding cases (*l*).

A pursuivant of the Heralds' College is not in the position of a legal adviser ; and has no privilege as to communications between himself and a person employing him, about a pedigree in the Heralds' College (*m*).

- (*h*) *Vide Greenough v. Gaskell*, 1 L. J. Q. B. D. 467.
 Myl. & K. 98 ; *Reid v. Langlois*, 1 (*k*) *Ibid.* (on App.), p. 527.
 Mac. & G. 627 ; 19 L. J. Ch. 337 ; (*l*) *Lowden v. Blakey*, 23 Q. B. D.
Anderson v. Bank of British Columbia, 332 ; 58 L. J. 617.
 2 Ch. D. 644 ; 45 L. J. 450. (*m*) *Slade v. Tucker*, 14 Ch. D. 824 ;
 49 L. J. 645.
 (*i*) *Procter v. Smiles and others*, 55

Pursuivant
 of Heralds'
 College : no
 privilege as to.

CHAPTER XVIII.

DEFENDANT'S PROOFS.

Evidence, how affected by the Rules of Procedure.

Evidence in Denial of the prefatory allegations, and publication.

Defence—Privileged occasion.

Conditional privilege.

What are questions of law for Judge, and what of fact for Jury.

Defence: Communication made in discharge of duty.

Duty and interest, as grounds of privilege.

Truth as a Justification in Civil Proceedings.

Evidence in support of Justification.

Matters alleged in exaggeration must be proved.

Skilled witnesses, opinions of.

Evidence to rebut Special Damage and in Mitigation.

Apology, and Offer of Apology.

Rule as to Admissibility of Evidence in Mitigation of Damages.

CHAP. XVIII.

Evidence, how affected by the Rules of Procedure.

THE mode of pleading the defence to actions of slander and libel being, as already shown, materially altered by the Orders and Rules of procedure under the Judicature Acts; and the plea of the general issue being thereby abolished (except as to the plea of "not guilty" by statute), the law having special reference to the evidence formerly available to the defendant under that comprehensive issue, will no longer have the prominent importance attached to it in some of the earlier editions of this work.

Under the former procedure, in actions for defamation, whether in the form of slander or libel, the defendant might, under the general issue, give evidence in denial of the publication of the defamatory matter, of the publication of it maliciously and in the defamatory sense alleged in the declaration, or in any other defamatory actionable sense which the words themselves conveyed (*a*). But under the present rules of pleading, all material facts on which the defendant relies for his defence must be pleaded in a summary form; but not the evidence by which they are to be proved (*b*). And every allegation of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted, will be taken to be admitted (*c*).

Evidence in denial of the prefatory allegations.

The defendant will not, therefore, be allowed to give any evidence to contradict the prefatory allegations in the statement of claim, unless they are denied in the manner stated in

(*a*) C. L. P. Act, 1852, sec. 61.

(*b*) *Vide* R. S. C., Ord. XIX., r. 4.

(*c*) *Ibid.*, r. 13.

the rule last mentioned. And this was so even before the new CHAP. XVIII.
rules of procedure (d).

If the publication is denied, it will be incumbent on the plaintiff to establish at the outset, a case of publication against the defendant. Until such proof is given, there can be no case for the defendant to answer. If the plaintiff give evidence showing a *prima facie* publication by the defendant, the latter may then give evidence to disprove such publication; or to show that he was the mere innocent agent of another, and that he was wholly ignorant that the paper contained a libel: as by showing that he was the mere bearer or carrier of a parcel, the contents of which he was wholly ignorant of (e): or, as appears by a recent decision, he may show that he was a news vendor, and sold the paper containing the libel in entire ignorance that it contained such (f).

The plaintiff cannot recover if the vocation in which he is libelled be an illegal one; as in a case where the plaintiff complained of having been libelled in his vocation as an exhibitor of sparring matches (g). Nor does an action lie for a libel against a party touching his conduct in any illegal transaction (h). But where the matter is independent of the illegal transaction, though arising out of it, the action will lie. As in a case where the libel charged, imputed to the plaintiff fraud in horse-racing, by betting largely against his own horse, and then withdrawing it from the race: it was held, that there was no illegality in horse-racing, in the absence of fraud; and even if it were altogether prohibited by law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters arising out of the transaction (i).

Where the plaintiff was described as a manufacturer of bitters, evidence was given to show that the plaintiff's trade was illegal; that a large quantity of the commodity had been seized and condemned by the excise; and that, under the pretence of manufacturing bitters, he manufactured an article of an entirely different description, which he sold to publicans for adulterating porter; such evidence being received as proof

Denial of the Publication.

In Defamation of Plaintiff in his vocation, Defendant may show that vocation illegal.

(d) *Vide Greene v. Sharpe*, 1 Car. p. 270.

& Mar. 533, per Patteson, J. And see *Heming v. Power*, 10 M. & W. 568; *Fradley v. Fradley*, 8 C. & P. 572, per Lord Abinger, C.B.; *Dance v. Robson*, Moo. & Mal. 296, per Lord Tenterden, C.J.

(f) *Emmens v. Pottle*, *supra*, p. 270.

(g) *Hunt v. Bell*, 1 Bing. 1; 7 Moore, 212.

(h) *Yrisarri v. Clement*, 3 Bing. 432.

(i) *Greville v. Chapman and others*, 5 Q. B. 731, 744.

(e) *Vide Day v. Bream*, *supra*,

CHAP. XVIII. of the illegality of the plaintiff's trade, but not as proof of the truth of the libel (*k*).

Defence, fair report of proceedings in Court of Justice.

If the defence relied on be, that the publication complained of is a fair report, published in a newspaper, of proceedings publicly heard in a court of justice; the defendant must be prepared with evidence to show that the report was fair and accurate, within the meaning of the statute, and that it was published contemporaneously with the proceedings in court (*l*). There is no presumption of law that the *judgment* delivered in any case contains a fair and accurate account of the evidence, or of the matters in question, upon which the judge is required to adjudicate, so as to bring it within the rule of privilege as to fair and accurate reports of proceedings in court. And therefore if the defence relied on be that the publication of the *judgment alone* is privileged as containing a fair and accurate statement of the trial and proceedings, it must be proved by evidence to contain such, and must be so found by the jury: it cannot be so inferred as a presumption of law (*m*).

Reports of public meetings.

Statutory protection is also given under certain conditions, to newspaper reports of the proceedings of public meetings, *bonâ fide* and lawfully held for a lawful purpose; and so also as to vestry, town council, school-board, and other meetings (*n*).

Conditional privilege.

In all other cases where the defence relied on is, that the communication was made on an occasion that was privileged; if it appears to have been made maliciously, or if evidence of actual malice be given, the defence of privilege will not avail, unless the defendant is able to negative such malice to the satisfaction of the jury.

The class of communications that are *primâ facie* privileged, are those where the *occasion* of the publication affords a defence in the absence of express malice. Or in other words;—the occasion on which the communication was made, rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made (*o*).

Principles on which privileged communication rests.

The privilege which protects a defamatory communication must result from a right or duty, to communicate or discuss

(*k*) *Manning v. Clement*, 7 Bing. 362.

(*l*) *Supra*, Chap. VII., Part II., p. 101.

(*m*) *Macdougall v. Knight & Son*, 14 App. Cas. 194; 58 L. J. Q. B. D. 537; but *query*? see *Macdougall v. Knight*

(No. 2), 25 Q. B. D. 10; 59 L. J. 522—4.

(*n*) 51 & 52 Vict. c. 64, s. 4.

(*o*) *Wright v. Woodgate*, 2 C. M. & R. 577, per Parke, B.

the particular matter in respect of which the alleged slander or libel is published. Any one in the transaction of business with another has a right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and such is one of the principles upon which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing, do not fall within that rule (p). CHAP. XVIII.

It has been held, in a leading case on the subject (q), that a communication, made *bonâ fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty; although it contains criminatory matter, which without that privilege, would be defamatory and actionable. And "duty," in the canon above stated, cannot be confined to legal duties, which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation. And it is for the judge to decide what kind of social or moral duty will afford a sufficient justification. Legal Canon as to privileged communications.

It has already been seen (r), that in the absence of privilege, if defamatory matter has been published, whereby actual or presumptive damage has been occasioned to the plaintiff, the malice of the defendant is a mere inference of law from the very act; for the defendant must be presumed to have intended that which is the natural consequence of his act. In such cases therefore, the onus of negating malice is properly cast upon the defendant; for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference must do so by showing something to rebut that inference. Where the onus of negating Malice is thrown upon the Defendant.

Whether the occasion is such as to rebut the inference of malice if the publication be *bonâ fide*, is a question of law for the judge: whether the *bona fides* existed is a question of fact for the jury (s). And whether or not the occasion gives the privilege is a question of law for the judge; but whether the party has fairly and properly conducted himself in the exercise What are questions of law for Judge: and what of fact for Jury.

(p) *Vide Tuson v. Evans*, 12 A. & E. 392; 33 L. J. C. P. 89. 736.

(r) *Supra*, Chap. XIII., p. 206.

(q) *Harrison v. Bush*, 5 E. & B. 344; 25 L. J. Q. B. 28; and see 321.

(s) *Taylor v. Hawkins*, 16 Q. B.

Whiteley v. Adams, 15 C. P. (N. S.)

CHAP. XVIII. of it, is a question of fact for the jury. So that, although the occasion be privileged, yet if there be evidence of express malice, the latter question must be left to the jury; for the judge, in such case, can neither nonsuit nor direct a verdict to be entered for the defendant (t).

Where the judge rules that the occasion was privileged, then if at the close of the plaintiff's case there be no evidence of malice, either on the face of the libel itself, or extrinsically, it is the duty of the judge to direct a nonsuit, or a verdict for the defendant. But whenever evidence of malice, either intrinsic or extrinsic, is shown in answer to the ruling of the judge—that the occasion was privileged—the question of malice or no malice, as one of fact, must be decided by the jury.

Rule of law as to Malice.

In the case of communications that are *prima facie* privileged, the rule of law is, that the action cannot be sustained without proof of malice; and, the absence of malice will be presumed unless and until such proof be given (u). And therefore, in an action, whether of slander or of libel, in which the words are spoken or libel published on a privileged occasion, the plaintiff will be nonsuited unless evidence of malice be given (x).

But unless there is a privileged occasion, the publication of defamatory matter is legally malicious: or, in other words,—in the absence of a justifiable occasion for the publication,—malice is but an inference of law, and should not then be left as a question of fact for the jury (y).

Defence, communication made in discharge of duty.

Cases in illustration of the general principle which makes the occasion operate as a defence unless express malice be proved, are those where the privilege consists in the discharge of a duty, whether of a public or a private nature; or where a party acts fairly and *bonâ fide* in the protection of his own or of another's interest. But where the circumstances under which the communication is made are such as to make it consistent with either the presence or the absence of malice, the plaintiff must prove malice to entitle him to maintain the action. Where the circumstances do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some

(t) *Vide Cooke and another v. Wildes*, 5 E. & B. 328; *Wright v. Woodgate*, 2 C. M. & R. 573; *Gilpin v. Fowler*, 9 Ex. 615; 23 L. J. Ex. 156.

(u) *Somerville v. Hawkins*, 10 C. B. 590.

(x) *Caulfield v. Whitworth*, 16 W. R. 936; *Taylor v. Hawkins*, 16 Q. B. 321; *Cooke and another v. Wildes*, 5 E. & B. 340; 24 L. J. Q. B. 367.

(y) *Vide Bromage v. Prosser*, 4 B. & C. 247.

duty, or for the purpose of endeavouring to enforce a right, CHAP. XVIII.
the communication is not privileged (z).

On the one hand therefore, although the privilege is wide the limits are defined; and any excess beyond the bounds of the occasion, or any deception practised under the cloak of privilege, will be evidence of malice; which, if found by the jury, will deprive the communication of the legal protection otherwise afforded by the occasion.

And accordingly, there are various occasions upon which, for the general convenience of society, communications that would otherwise be unlawful, are held to be privileged: among the most prominent of which are communications as to the characters of servants. A master or mistress is privileged in making a defamatory communication, to a *bonâ fide* inquirer, respecting the character of a servant, the competency of a governess, the trustworthiness of a steward, and such like; if it be made truthfully and without malice (a). And where a person making an imputation upon a workman or servant, is not actually the employer of the workman or servant to whom he imputes misconduct and negligence in his work, or makes complaint to his superior; still, the imputation will, in some cases, fall within the class of privileged communications. For instance, where the defendant was tenant of a farm, and the plaintiff, a carpenter, was sent by the landlord's agent to do some repairs to a house on the farm; and on the defendant complaining to the plaintiff in the presence of a third party, and afterwards to the agent, that the work was done improperly; and also accusing the plaintiff of breaking open a cellar-door and getting drunk; it was held, that although the relation of master and servant did not subsist between the plaintiff and the defendant, still, under the circumstances, the defendant was privileged in making the complaint, provided it was done *bonâ fide* and without malice; but that a repetition of the charge to a fellow-workman of the plaintiff's *in the plaintiff's absence*, was not privileged (b). Communications as to character of servants and others.

In giving the character of a servant it will be presumed, unless the contrary be expressly proved, that the character was given without malice: and the action cannot be supported unless it be proved that the defendant acted maliciously, and knowingly stated what was untrue.

(z) *Wenman v. Ash*, 13 C. B. 846,
per Maule, J.

(b) *Toogood v. Spyring*, 1 C. M. &
R. 194.

(a) *Supra*, Chap. XI., p. 160 *et seq.*

CHAP. XVIII.

Voluntary
Communica-
tions.

Bonâ fide
applications
seeking redress
or to prevent
abuses.

Communica-
tions in vindi-
cation of
character.

Where Plaintiff
and Defendant
have both had
recourse to the
press.

When evidence
of excess is
given.

Voluntary communications, when made *bonâ fide* to the proper authorities upon occasions of seeking redress for wrongs or injuries suffered, whether public or private, are privileged in the absence of express malice; notwithstanding that such communications are defamatory of third parties. And particular expressions in such communications are not to be too strictly scrutinized if the intention of the sufferer be good (c).

Publications in vindication of character, in self-defence, or by way of reply to personal attacks, are also privileged, if *bonâ fide*, and for the purpose only of such vindication or reply; provided they do not go beyond those objects; and are in answer to charges or imputations published of the party seeking to justify his conduct, or to repel the attacks (d).

Where the plaintiff and the defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public; and in which the plaintiff was the *first* to appeal to the press; it is important to see if malice is made out against the party sued, or if he has published only what he believed to be required for the interests of truth (e). But the defendant cannot, even in mitigation, prove that the plaintiff has published libels upon him, unless they constituted the provocation for publishing the principal libel (f); having come to his knowledge before the libel in question (g).

Where a communication, otherwise privileged, is made in a manner more injurious than necessary, it is to that extent libellous. And therefore, notwithstanding that the occasion is privileged, yet if improper motives be imputed, or if the communication be unnecessarily violent or excessive, such will be evidence of malice, and will also be deemed an excess of the privilege. But where violent or exaggerated language has been provoked by similar language on the other side, the jury will be at liberty to find that it is excused on that ground (h).

Where the defendant shows facts in defence as an answer to the action, in the absence of express malice it is still a question for the judge whether in point of law, the slander does not manifestly exceed the limits of communication which such

(c) Vide *Woodward v. Lander*, 6 C. & P. 548; and *supra*, Chap. XI., p. 170.

(d) *Supra*, p. 155 *et seq.*

(e) *Hibbs v. Wilkinson*, 1 F. & F.

608, per Erle, C.J.

(f) *May v. Brown*, 3 B. & C. 113.

(g) *Watts v. Fraser*, 7 A. & E. 223.

(h) *Supra*, p. 193 *et seq.*

an occasion would justify; and when such is the case, the question of express malice should not be left to the jury (i). But this decision cannot be supported at the present day; for according to more recent cases, where there is an excess beyond the privilege, the presumption of malice arises, and the question must be decided by the jury, not the judge; and the plaintiff is justified in requesting the judge to leave the question to the jury as to whether the alleged excess does not show malice, so as to deprive the defendant of the protection which the occasion would otherwise afford him (k).

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But there must be an unequivocal excess, for if the evidence relied on as showing excess be capable of a *bonâ fide* construction, the presumption of law will prevail in favour of the defendant (l). The language of privileged communications is not to be subjected to too strict a scrutiny; nor is every excess beyond the absolute exigency of the occasion to be deemed evidence of malice; particularly where the communication has been made in vindication of character (m).

Where a repetition of a slanderous rumour affecting two persons, was made to one of the persons charged, but in the absence of the other (the plaintiff), and in the presence of third persons; the communication was held to be privileged, after the finding of the jury that it was spoken *bonâ fide* and without malice (n).

Where the action was for libelling the plaintiff in his office of calendarer of State papers; articles published in newspapers showing that a public discussion had taken place with regard to the plaintiff's appointment, were allowed by Erle, C.J., to be given in evidence on the part of the defendant for the purpose of showing, *as a matter of fact*, that such a discussion had taken place, to the knowledge of both parties; but not for the purpose of showing *bona fides* on the part of the defendant (o).

Where the occasion of making a communication, otherwise slanderous, is such that the communication might be privileged

(i) *Godson v. Home*, 1 Brod. & Bing. 7. 38 L. J. Ex. 138.

(k) *Cooke v. Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; *Fryer v. Kinneraley*, 15 C. B. (N. S.) 422; 33 L. J. C. P. 96; *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124.

(m) *Laughton v. The Bishop of Sodor and Man*, 9 Moo. P. C. C. (N. S.) 337; L. R. 4 P. C. Ap. C. 508; 42 L. J. P. C. 16.

(n) *Davies v. Snead*, L. R. 5 Q. B. 608.

(l) *Spill v. Maule*, L. R. 4 Ex. 232;

(o) *Turnbull v. Bird*, 2 F. & F. 522.

CHAP. XVIII. if fairly arising out of the occasion, it is a question for the jury whether it is so or not: as for instance, whether it is relevant to a privileged inquiry; and in such a case, if the inquiry be such that a communication might be relevant to it, it may be a question for the jury whether the defendant really believed it to be so (*p*).

*Duty, as
ground of
privileged
occasion.*

To entitle a matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*,—or (to use our own equivalent) honesty of purpose,—is essential. And to this, again, two things are necessary: 1st. That the communication be made not merely in the *course* of duty (*i.e.* on an occasion which would justify the making it), but also from a *sense* of duty. 2ndly. That it be made with an honest belief in its truth (*q*).

A duty to make a truthful communication arises where a master or mistress is applied to about the character, fitness, or capacity, of a servant, who has been dismissed from the service of the other, to communicate to a *bonâ fide* inquirer the fact and cause of such dismissal; and any other facts as to character, fitness, or capacity, however disparaging, provided they be true, or are *bonâ fide* believed to be true. And if a master, having given a servant a good character, soon afterwards discover that the servant was dishonest, and that the character given was undeserved, it is his duty to communicate the fact of such discovery to the person who hired the servant on the faith of the good character given (*r*). And a duty sometimes arises in the case of persons in authority over others, to communicate facts to the principal, or common employer, though disparaging to the characters of their subordinates; provided such facts have reference to the duties of the employment: and it is the duty even of the subordinates themselves, to inform employers of the fraudulent or other bad conduct of others (whether their superiors or not) in the course of their common employment. So too, it is the duty of everybody in the interests of justice, to give information to the proper authorities, of any facts they may know as to a murder, robbery, or other crime having taken place; and in order to bring an offender to justice, or to prevent a planned or intended robbery, arson, bigamy, or other crime or misdemeanor. And there are many other duties, both public and private, some of

(*p*) *Beatson v. Shene*, 29 L. J. Ex. Q. B. 62, per Cockburn, L.C.J.
430.

(*r*) *Supra*, p. 163.

(*q*) *Dawkins v. Paulet*, 39 L. J.

imperfect obligation, which would place a person in a privileged position in making a defamatory communication to another, provided he had probable cause for making it, and *bonâ fide* believed it to be true. CHAP. XVIII.

But where the act is not justified by the occasion, the honesty of the party's intention and his belief in the truth of the statement he makes, are wholly beside the question: for where the occasion ceases, the right to publish cannot be justified; nor can the communication be excused on the ground of duty or interest, however strong.

The duty of *not* slandering your neighbour on insufficient grounds is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity (s).

An *interest* in the matter of the communication, such as will be recognised in law as affording a privilege, or an excuse for the publication of defamatory matter by reason of the occasion, must be, if not an actual, personal, or mutual interest, at all events an unequivocal interest, capable of being clearly recognised as such; for if it be an interest arising out of mere idle curiosity or other improper feeling, not recognisable as a legitimate interest, it will afford no ground of protection. Such recognised interest may be either of a public or a private nature; and may exist in a great variety of cases. But a mere interest in *making* a defamatory communication is not alone sufficient; either the party making it, or the party to whom it is made, must have an actual interest *in the matter* communicated. *Interest, as ground of privileged occasion.*

Justification; Truth.—The defendant is, *primâ facie*, justified in law, and exempt from all civil responsibility, if that which he publishes be true (t). For, as already observed, no one in point of natural justice and equity, can have any title to a false character; he can show no legal interest in the suppression of truth, or in the continuance of error; it would be inconsistent with every sound legal principle and analogy, to allow him to recover damages for an injury to that which he either does not, or at least ought not, to possess; and it would be contrary to the plainest and most obvious principles of public policy and convenience, to permit a man to make *Truth as a Justification in Civil Proceedings.*

(s) See *Coxhead v. Richards*, 2 C. B. 601, per Coltman, J. *truth*, in answer to indictment or information, *vide post*, "Criminal Division."

(t) As to justification on ground of

CHAP. XVIII. gain of the loss of that reputation and character in society which he had justly forfeited by his misconduct.

That truth was a good justification, does not appear to have been doubted in the case of an action for words spoken: in respect of an action for libel, indeed, the contrary has been maintained (*u*); but the authorities upon this point fully establish the validity of such a justification in the case of civil proceedings (*x*).

Evidence in support of justification

Where the slander or libel is intended to be justified on the ground of its truth, such a defence in order to be available at the trial, must be specially pleaded and proved at the trial. The *bonâ fide* belief of the defendant that the charge is true, will not be available as a defence (*y*).

Where the libel in substance charges that the plaintiff was guilty of murder, under circumstances of grave and malignant aggravation; and the justification states, simply, that the plaintiff committed murder by killing his antagonist in a duel; such a justification is insufficient. If the libel had imputed murder *simpliciter*, it would have been enough to show in the plea that the plaintiff had committed murder. But, if the libel goes further, and states something besides, which is injurious to the plaintiff's character; it is clear, upon every principle of the law of libel, that *that* must be justified as well as the rest, or the defence fails (*z*).

Where the libel imputed bigamy to the plaintiff, the defendant justified on the ground that the plaintiff was guilty of bigamy; and it was held, that in order to support the plea of justification, the same strictness of proof was required as would be necessary on the trial of an indictment for bigamy (*a*).

Matters alleged in exaggeration must be proved.

So, too, if the defendant fail in proving all the matters of exaggeration stated in the libel and alleged in the justification to be true, the plaintiff will be entitled to a verdict on the justification (*b*), although the plea may merely allege that the matters charged in the libel are true in substance and in fact. Where a libel charged the plaintiff with having knocked

(*u*) *Harman v. Delany*, Str. 898; 73. Dig. Law of Libel (1765), p. 16.

(*x*) *Lake v. Hatton*, Hob. Rep. 253; 11 Mod. 99; *F'Anson v. Stuart*, 1 T. R. 748; and cases cited *infra*.

(*y*) *Vide Campbell v. Spottinwoode*, 3 B. & S. 776; 32 L. J. Q. B. 185; *Jenoure v. Delmege* (1891), App. Cas.

(*z*) *Helsham v. Blackwood*, 11 C. B. 129.

(*a*) *Wilmett v. Harmer and another*, 8 C. & P. 695, per Lord Denman, C.J.: and vide *Chalmers v. Shackell*, 6 C. & P. 475.

(*b*) *Weaver v. Lloyd*, 2 B. & C. 678.

out the eye of a horse and other acts of cruelty ; the defendant pleaded that the matters contained in the alleged libel were true in substance and in fact ; and the jury having found that the plea was true in all particulars, except that the eye was not knocked out ; the court held, that the plaintiff was entitled to a verdict on that plea (c). But it is not necessary in such cases to prove circumstances which were not ingredients in the slanderous charge ; so long as the sting of the charge is fairly met (d).

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In a case in which the plaintiffs were extensive coal merchants, and one of their agents in the country having entered into a contract for supplying best coals, supplied coals of an inferior description and deficient in weight ; the name of the plaintiff's firm was afterwards used, with reference to the transaction, in a defamatory statement in a newspaper, imputing that the plaintiffs were cognizant of and had sanctioned the improper and fraudulent conduct of their agent : they brought an action for the libel, when the defendant, having by his plea alleged that the fraud of the agent was sanctioned by the plaintiffs, the judge ruled that the defendant must prove it ; and directed the jury that they must find for the plaintiffs, unless they were satisfied of some complicity on their part in the misconduct and fraud imputed to their agent ; and such was held no misdirection (e).

Charge against principals, of complicity in fraud of Agent.

In an action by an attorney, for a libel in charging him with disgraceful conduct in having disclosed confidential communications made to him as an attorney : upon a plea justifying the charge as true, it was held, that the question for the jury was, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally ; and not whether they were such as he would not be compellable to disclose if called as a witness in a court of justice (f).

Charge of disclosing confidential communications.

Where the libel complained of, contained amongst other imputations, charges of misconduct in relation to the plaintiff's office of coroner, and stated, " There can be no court of justice unpolluted which this *libellous journalist*, this violent agitator and sham humanitarian, is allowed to disgrace with his presidency " ; the defendants pleaded in justification of the words " libellous journalist," that on the 29th March, 1828

Malicious plea not sufficiently proved.

(c) *Ibid.*, 2 B. & C. 679.

C. B. (N. S.) 95.

(d) *Edwards v. Bell*, 1 Bing. 403.(f) *Muore v. Terrell and others*, 4(e) *Prior and another v. Wilson*, 1

B. & Adol. 870.

CHAP. XVIII. (twenty-one years previously), the plaintiff, being the proprietor of a public journal, published in the same a false, scandalous, and malicious libel of one Cooper, with intent to injure him in his profession as a surgeon ; it was held, that the plea imputed to the plaintiff moral misconduct and malice in the publication of the libel, and was not sufficiently supported by the production of the record in the case stated in the plea ; by which it appeared that £100 damages had been given against the now plaintiff (g).

If the Justification be sufficiently proved, it will be sufficient in some cases.

Under an allegation in a libel that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter ; it was held to be unnecessary for the defendant to prove that the system had been *entirely* crushed ; but that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations, varied in some respects from the allegation, there being evidence for the jury as to the cause of the death (h).

Where a printed placard was issued by a railway company, stating that the plaintiff had been convicted by justices of an offence against the company's bye-laws and fined, with an alternative of *three weeks'* imprisonment ; when in fact the alternative in the conviction was only *fourteen days* ; it was held, that the mere inaccuracy of the statement did not necessarily make it libellous, but that it would be a question for the jury whether the statement was or was not substantially true (i).

Where justification is pleaded to part only of the libel.

Where a justification is pleaded to a part only of the libel, it is a question for the jury at the trial, whether the justification is proved as to that part ; for they cannot give damages for that part which has been proved to be true. But the jury may find their verdict upon the portion which the defendant has failed to prove the truth of ; and also on that part which the defendant has not attempted to justify. In some cases where the partial truth is proved, it may make the case a great deal worse ; because the thing which often gives the sting to a libel is, that being partially true a misrepresentation of what is

(g) *Wakley v. Cooke and another*, 4 Ex. 511 ; 19 L. J. (N. S.) 91.

(h) *Morrison v. Harmer*, 3 Bing. N. C. 759, 767 ; *Warman v. Hine*, 1 Jur. 820.

(i) *Alexander v. N. E. Ry. Co.*, 34

L. J. Q. B. 152 ; 6 B. & S. 340 ; and *vide The Queen v. Warnborough*, 4 Times L. R. 520 ; *Gwynn v. S. E. Ry. Co.*, 18 L. T. (N. S.) 738, per Cockburn, L.C.J.

partially true makes it more difficult to separate the truth from the falsehood than if the whole were false. It is always material therefore, in estimating the damages, to consider the conduct of the parties on both sides (*k*). CHAP. XVIII.

As to the evidence in support of a justification to the effect that the defendant received the libellous statement from another, and upon publication disclosed the author's name; it appears that such a justification is not sufficient unless the defendant also shows that he repeated the statement on a justifiable occasion, and that he believed it to be true (*l*). And proof of the existence of a slanderous rumour will not justify the repetition of it, unless it can be shown that such repetition was made on a justifiable occasion; or that the rumour itself was true; and therefore, evidence which merely proves that the rumour did in fact exist, and that the defendant merely repeated it as a rumour, will not establish a justification (*m*). That Defendant merely repeated what he heard from another.

Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted (*n*). But where the libel declared on consisted in imputing to the plaintiff, the owner of a race-horse, which had been entered for a race, that he had acted dishonourably in withdrawing the horse just before the race came off, after having betted largely against the horse; a witness for the plaintiff stated in cross-examination, that by the rules of "the Jockey Club," the owner of a horse might bet against his own horse, and then withdraw him: it was held, that the witness might be asked, on re-examination, whether he did not consider such conduct dishonourable (*o*). Skilled witnesses, opinions of.

Whatever matter of fact a jury is asked to act upon must be proved. It is not allowable to read matters of foreign law, nor works of authority among a certain religious community, for the purpose of fixing parties with particular opinions, without proof of such works as matters of fact; nor would it be permissible to read works on farming or medical science, Speculative opinions in books, as matter of Defence.

(*k*) *Polhes v. Goodlake*, per Blackburn, J., Sit. N. P. Feb. 10th, 1874.

396; 37 L. J. Q. B. 125; and *vide supra*, p. 198.

(*l*) *De Crespigny v. Wellesley*, 5 Bing. 392; *M'Pherson v. Daniels*, 10 B. & C. 270.

(*n*) *Ramadge v. Ryan*, 9 Bing. 335.

(*o*) *Greville v. Chapman and others*, 5 Q. B. 731.

(*m*) *Watkin v. Hall*, L. R. 3 Q. B.

CHAP. XVIII. for the purpose of inducing the jury to form a certain opinion (*p*). And in the same case, the plaintiff having admitted on the trial, that he had subscribed money to an Association for the conversion of England to the Roman Catholic faith, but had done no other act to become a member of it; it was held, that he could not be asked on cross-examination, whether his name was not written in a certain book of the Association; no notice having been given to produce the book (*q*).

Evidence to rebut Special Damage, and in Mitigation of Damages.

Evidence in Mitigation of Damages, &c.—Evidence may be given on the part of the defendant to rebut the evidence of special damage offered by the plaintiff, and in mitigation of such damage. For these purposes considerable facilities are now afforded to defendants in actions of slander and libel; 1st—by the Libel Act, 1843 (*r*); whereby if steps be promptly taken in accordance with the provisions of that Act, persons may make speedy reparation to the injured party; and then plead and give evidence of the same in mitigation of damages and 2ndly—by the Rules of the Supreme Court (*s*), by which the defendant may give evidence of the circumstances under which the libel or slander was published, and as to the character of the plaintiff, in mitigation of damages, on furnishing particulars of the matters as to which he intends to give evidence, seven days before the trial.

Apology or Offer of Apology may be given in Evidence.

And 1stly. By the Libel Act, 1843, s. 1: In any action for defamation, the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) may give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation, before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Apology for Libel in Newspaper, &c.

And, by section 2, In any action for a libel contained in any public newspaper or other periodical publication, it is competent for the defendant to plead that such libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such news-

(*p*) *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.

(*q*) *Ibid*

(*r*) 6 & 7 Vict. c. 96, ss. 1 and 2 (amended by 8 & 9 Vict. c. 75, s. 2).

(*s*) Ord. XXXVI., r. 37.

paper, etc., a full apology for the said libel; or, if the news-CHAP. XVIII.
 paper, etc., in which the said libel appeared, should be
 ordinarily published at intervals exceeding one week, had
 offered to publish the said apology in any newspaper, etc., to
 be selected by the plaintiff (*t*); and to such plea it is competent
 to the plaintiff to reply generally, denying the whole of
 such plea.

By 8 & 9 Vict. c. 75, s. 2, It shall not be competent to any defendant in such action, whether in England or in Ireland,
 to file any such plea, without at the same time making a
 payment of money into court by way of amends [*as provided*
by the previous Act] (*u*); but every such plea so filed without
 payment of money into court, is to be deemed a nullity; and
 may be treated as such by the plaintiff in the action.

Where an apology is pleaded, it is for the jury to say
 whether the same is reasonably sufficient. If it be such as to
 add a degree of bitterness to the libel it will be unsatisfactory.
 A defendant is not bound to insert an apology dictated by the
 plaintiff. If he insert one which an impartial person would
 consider reasonably satisfactory under all the circumstances
 of the case, he will be protected (*x*). The question of the
 sufficiency of an apology being eminently one for the jury,
 execution will not be stayed in the event of a verdict for the
 defendant, upon an application showing that the plaintiff
 intends to move to set aside the verdict as against the weight
 of evidence (*y*).

And where the jury found that the libel was published
 without actual malice but not without gross negligence, and
 they assessed the damages at £5; it was held, that the
 plaintiff was entitled to judgment (*z*).

Where the apology was inserted in small type, among the
 notices to correspondents; and the jury found, that although
 in its terms sufficient, it should have been inserted in a more
 prominent part of the paper, and in larger type; that the
 amount of damages (40*s.*) paid into court was sufficient; and
 that there was no malice on the part of the defendant and no
 positive negligence; it was held, that upon these findings, the
 plaintiff was entitled to the verdict, with nominal damages (*a*).

(*t*) So much of this section as related to payment into court is now repealed.

(*u*) The words within the brackets are repealed.

(*x*) *Risk Allah Bey v. Johnstone*, 18

L. T. (N. S.) 620.

(*y*) *Ibid.*

(*z*) *Oxley v. Wilkes and others*, C. A. (1898), 2 Q. B. 56.

(*a*) *Lafone v. Smith and others*, 3

H. & N. 735; 28 L. J. Ex. 33.

CHAP. XVIII.

Rule as to
admissibility
of evidence in
mitigation of
damages.

2ndly. By the R. S. C. : In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant will not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence (b).

This rule was intended to remove a difficulty which had been felt since the defendant had been deprived of his plea of the *general issue*. Under the old system of pleading which existed prior to the Judicature Act, a defendant, in an action of slander or libel, was permitted under the general issue, though no justification was pleaded, to give general evidence (in mitigation of damages) short of a justification, for the purpose of showing that he had grounds for the imputation; and so also, in some very exceptional cases, general evidence impeaching the plaintiff's character. It should be observed, however, that under the old system, it was usual to allege in the declaration, by way of prefatory averment, that prior to the publication of the defamatory matter complained of, the plaintiff had always been a person of good character and had never been suspected to have been guilty of any such offence, &c.; and then, after stating the defamatory matter, with appropriate innuendoes, to conclude with an allegation of loss of character, &c., sustained from the speaking or publishing the calumny: the latter being an allegation of special damage, could not be pleaded to; but in actions of slander in respect of words not actionable in themselves, but only by reason of special damage caused by them, the plea of "not guilty" put in issue not only the speaking and publishing of the words, but also the special damage alleged (c). Prefatory averments were afterwards rendered unnecessary by the C. L. P. Act, 1852, s. 61; but the plea of the general issue remained until the Judicature Act, 1873.

In a case just prior to the rule above stated the plaintiff, a journalist and dramatic critic, sued the defendant, the editor and proprietor of the *Referee* newspaper, for a libel published in that paper, imputing to the plaintiff that by threatening to publish in a journal called *The Theatre*, defamatory matter of

(b) Ord. XXXVI., r. 37.

(c) See *Wilby v. Elston*, 8 C. B. 142.

a deceased actress, he had extorted a sum of £500 from A. G. Defence (*inter alia*) that the defamatory matter was true in substance and in fact. It was held, that evidence that there were rumours, before the publication of the libel, to the same effect as the allegations contained in the libel, were inadmissible in mitigation of damages: that both principle and authority were against the reception of such evidence; and that since the Judicature Act and Rules of procedure which require that the "material facts" on which the defendant relies should be stated on the pleadings, even if the evidence were admissible, the defendant could not be allowed to avail himself of it, as he had not stated his intention of so doing in his pleading (*d*). CHAP. XVIII.

Upon compliance with the rule above stated, evidence may be given in mitigation of damages, of the circumstances under which the defendant published the libel or slander. This includes all cases in which no justification stands upon the record; but in which the defendant relies on certain circumstances in mitigation: as for instance the source from which the defamatory matter was derived; that it was published in vindication of character; so also circumstances showing provocation by reason of matter previously published by the plaintiff of the defendant. Evidence in mitigation, as to circumstances under which libel or slander published.

There can be no set-off of one libel, or act of misconduct, against another (*e*); but, in estimating the damages, the jury may fairly consider the conduct of the plaintiff, and the degree of respect which he himself has shown for the feelings of others (*f*). Nor can any previous bickering between the parties be brought forward as a set-off to a libel; but at the utmost as a circumstance in mitigation of damages (*g*). Counter-libels when admissible.

The defendant is at liberty to give in evidence in mitigation of damages, that the plaintiff has already recovered (or has brought actions for) damages, or has received, or agreed to receive, compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought (*h*). Evidence in mitigation that damages recovered or sought in other actions.

General evidence that the plaintiff has been in the habit of Where Plaintiff and Defendant have habitually libelled each other.

(*d*) *Scott v. Sampson*, 8 Q. B. D. 213; 1 L. R. Q. B. 684, 698, per Blackburn, J.
491; 51 L. J. 380, per Mathew and Cave, JJ.

(*e*) *May v. Brown*, 3 B. & C. 126. (*g*) See *Robertson v. McDougall*, 4 Bing. 684, per Park, J.

(*h*) The Law of Libel Amendment Act, 1888, s. 6.

(*f*) *Kelly v. Sherlock*, 35 L. J. Q. B.

CHAP. XVIII. libelling the defendant, is inadmissible (i). But it is evidence, it has been said, in mitigation of damages (k). The latter, however, of these positions is too large, and it seems that, at most, the defendant cannot be allowed to do more than prove the publication of libels by the plaintiff, which are *connected* with the libel which is the subject of the action (l). Therefore, libels published by the plaintiff of the defendant, of an earlier date, and in direct relation to the libel declared on, may be given in evidence for the purpose of mitigating the damages ; as where such previous libels constitute the provocation to the principal libel. It seems, however, to be clear in principle that the libels themselves ought to be strictly proved (m).

CHAPTER XIX.

TRIAL, PROCEEDINGS AT, IN ACTIONS OF SLANDER AND LIBEL.

*Mode of Trial: Special Jury.
Libel or no libel as a question of fact
for the Jury.
Direction of the Judge to the Jury.*

*Libel or no libel as a question for the
Court.
When verdict of Jury will be set aside.
When the Judge may withhold the case
from the Jury.*

CHAPTER XIX. ACTIONS of slander and libel must (except by consent as provided by the following rules) be tried by a judge with a jury.

Under the R. S. C. (a), in actions of slander and libel, the plaintiff may in his notice of trial, and the defendant may upon giving notice within four days from the time of service of notice of trial, signify his desire to have the issues of fact tried by a judge with a jury, and thereupon the same shall be so tried.

By rule 4, the court or a judge is empowered (*as to causes formerly triable without a jury*) to direct any question or issue of fact, or partly of fact and partly of law, to be tried without a jury. But as actions of slander and libel were not so triable

(i) *Wakley v. Johnson*, 1 Ry. & Moo. 422.

(k) *Finnerty v. Tipper*, 2 Camp. 76.

(l) *May v. Brown*, 3 B. & C. 113.

(m) *Tarpley v. Blahay*, 2 Bing. N. C. 437.

(a) Ord. XXXVI., r. 2.

prior to the Judicature Act, neither the court nor a judge has any power under this rule, without the consent of parties, to direct such actions to be tried without a jury. CHAPTER XIX.

In the absence of any notice under rule 2 (*supra*), in the case of an action in the Chancery Division, to restrain the publication of a trade circular, imputing that the plaintiff's goods were spurious, it has been ruled, that the issues of fact may be tried by a judge without a jury: and that it will be too late when the action comes on for trial, after all the evidence has been given, to object that the issues of fact should have been submitted to a jury (*b*).

The plaintiff may have the issues tried by a special jury upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial. And the defendant is entitled to the like privilege, on giving notice in writing at any time after the close of the pleadings, and before notice of trial; or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given. Provided that a judge may, at any time, make an order for a special jury, upon such terms, if any, as to costs and otherwise, as may be just (*c*). Special Jury.

The judge may, if he thinks it expedient for the interests of justice, postpone or adjourn the trial for such time, and to such place, and upon such terms, if any, as he shall think fit (*d*). Adjournment,
or postponement,
of trial.

The postponement of the trial of an action of libel or slander, upon affidavit, on the ground of the absence of a material witness, is entirely within the discretion of the judge at *Nisi Prius* (*e*).

In an action of libel, where a justification was pleaded, the court, even after notice of trial, on the application of the defendant, put off the trial to enable him to procure the attendance of witnesses from abroad (the sources of the proposed evidence being particularly pointed out in the affidavit), but imposed the terms, of his undertaking to admit upon the trial the publication of the alleged libel (*f*).

Under the former practice, when a justification was pleaded without the general issue, the defendant was entitled to Affirmative
Issue: Right
to begin.

(*b*) *Thomas v. Williams*, 14 Ch. D. 864, 871; 49 L. J. 606-7, per Fry, J.

(*c*) Ord. XXXVI., r. 7 (*b*) (*c*) and (*d*).

(*d*) *Ibid.*, r. 34.

(*e*) *Turner v. Merryweather*, 7 C. B. 251.

(*f*) *Brown v. Murray*, 4 D. & R. 830. And see *M'Cauley v. Thorpe*, 1 Chit. Rep. 685.

CHAPTER XIX. begin (*g*). But, it was stated by Tindal, C.J. (when the question arose before him on the trial of an action of libel, in which the only plea on the record was one which professed to justify the libel on the ground of its truth), that the judges had come to a resolution that the plaintiff should in future begin on the trial of all actions for personal injuries, and also in slander and libel, notwithstanding that the general issue be not pleaded, and that the affirmative be on the defendant (*h*); and such appears to have been the general practice ever since.

Time of giving Evidence to rebut Justification. Where issues are joined on affirmative pleas of justification, the plaintiff's counsel may either in the first instance rebut the justification, or he may wait till the defendant has offered affirmative evidence in proof of his justification; but he cannot divide his proof by giving part in evidence in the first instance and part afterwards (*i*).

The libel itself must be produced at the trial. The libel itself should be produced at the trial, and shown or read to the jury, who have a right in all cases to see it (*k*). If it has been lost or destroyed, secondary evidence of its contents may be given, under conditions already stated (*l*).

Defendant entitled to have the whole details. The defendant, according to the ordinary rule, is entitled to have the whole of the publication read, from which the passages charged as libellous are extracts (*m*); or the whole of the conversation in which the slander complained of was spoken, detailed in evidence; for he is entitled to show by the whole context, that the defamatory matter was not in fact used in an actionable sense. And where a letter of the defendant's was read, which referred to an account of the transaction related in a newspaper, that newspaper, it was ruled, was evidence (*n*).

If libellous articles in a Newspaper are put in as part of Plaintiff's case, Defendant may have other parts of same paper read. In an action for a libel contained in a newspaper, the defendant has a right to have read, *as part of the plaintiff's case*, another part of the same newspaper referred to in the libel complained of (*o*). And where the plaintiff proposed to put in evidence the newspapers containing the alleged libels,

(*g*) *Cooper v. Wakley*, 1 Moo. & Malk. 250, per Lord Tenterden, C.J., and per Bayley and Littledale, JJ.

(*h*) *Carter v. Jones*, 6 C. & P. 64.

(*i*) *Browne v. Murray*, 1 R. & M. 254; *Sylvester v. Hall*, *ib.* See *Rees v. Smith*, 2 Starkie's C. 31; *De launey v. Mitchell*, 1 Starkie's C. 439; *Spooner v. Gardiner*, 1 R. & M. 86; *Pierpoint v. Shapland*, 1 Car. & P. 447.

(*k*) *Wright v. Woodgate*, 2 C. M. & R. 573; *Gilpin v. Fowler*, 23 L. J. Ex. 156.

(*l*) *Supra*, p. 274-5.

(*m*) *Cooke v. Hughes*, 1 R. & M. 112, per Abbott, L.C.J.

(*n*) *Wearer v. Lloyd*, 2 C. & P. 296; *cor. Garrow, B.*

(*o*) *Thornton v. Stephen*, 2 M. & Rob. 45, per Lord Denman, C.J.

for the purpose of having *only the libellous articles read*; this was objected to on the part of the defendant, who claimed to have the whole put in as part of the plaintiff's case, and to enable the defendant to call attention to certain evidence published in the same paper with the articles, and upon which they were based. Cockburn, L.C.J., after consulting Blackburn, J., ruled, that as the articles in question referred to the other proceedings, the whole must be put in as part of the plaintiff's evidence (*p*). But where a paragraph in a subsequent number of a newspaper, is given in evidence by the plaintiff for the purpose of proving malice, the defendant is not entitled to have read, out of the same newspaper, other paragraphs having no reference to the one read by the plaintiff (*q*). Where an author brought an action against the defendant for an alleged libel contained in a criticism on his book; it was ruled, that where there was no direct personal imputation, and the alleged libel was entirely by way of professed criticism, it was properly part of the plaintiff's case to put the book in, in order to show that the criticism was malicious (*r*).

CHAPTER XIX.

The Libel Act (1792) 32 Geo. III. c. 60,—by which the jury are to find as a fact whether or not the matter charged is a libel; and the judge, in his discretion, is to state to the jury his opinion and direction on the matter in issue,—does not apply to civil actions, but only to the trials of indictments and criminal informations. It has, however, been the constant practice since the cases of *Parmiter v. Coupland* (*s*), and *Baylis v. Lawrence* (*t*), in civil as well as criminal trials, for the judge to direct the jury what in law constitutes a libel, and then to leave it to them to say whether the publication in question falls within that direction. And the jury must accept the law as laid down by the judge, and find their verdict according to the evidence.

Libel or no
Libel as a
question of
fact for the
Jury.

The statute was never intended to take from the court the power of deciding whether certain words are *per se* libellous or not (*u*). And where a libellous construction has been put upon the publication by an innuendo, it is the duty of the judge to say whether the publication is *capable* of the construction so

(*p*) *Hedley v. Barlow and another*, 4 F. & F. 227.

(*q*) *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 229.

(*r*) *Strauss v. Francis*, 4 F. & F. 1110, per Cockburn, L.C.J., and on

the previous trial of this case, so ruled per Erle, C.J., *Ibid.*, p. 939.

(*s*) 6 M. & W. 105.

(*t*) 11 A. & E. 920.

(*u*) See *Reeves v. Templar*, 2 Jur. 137, per Lord Abinger, C.B.

CHAPTER XIX ascribed to it. If the judge is satisfied that it is so capable, it must then be left to the jury to say whether the publication has the meaning so ascribed to it (*x*). But if the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury (*y*).

Direction of
the Judge to
the Jury.

The judge may, in his discretion, direct the jury that the publication in question is, in point of law, a libel (*z*). And the jury are bound to take the judge's definition of a libel : and if the matter proved to have been published be calculated to bring the plaintiff into disrepute, or hold him up to ridicule, that will constitute a libel : and the jury have no right, in determining the question as to whether or not the matter charged is a libel, to enter into any other matters which do not arise upon that issue : and therefore, where it appears that a verdict for the defendant is manifestly wrong, it may be set aside upon the ground that the matter was a libel, notwithstanding that the jury have found that it *was not* (*a*). And so also, if the judge direct the jury that the publication in question is, in law, a libel ; and acting upon that direction, they find a verdict for the plaintiff ; if the court should afterwards be of opinion that the publication is not a libel, the verdict will be set aside for misdirection (*b*). But the judge is not bound to state to the jury, as matter of law, whether the publication complained of is or is not a libel : the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition ; and, as incidental to that, whether it is calculated to injure the character of the plaintiff (*c*).

Libel or no
libel as a
question for
the Court.

As to what is the province of *the court* in an action of libel ; and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the court can give judgment for the defendant, on the ground that, though the jury have found that in their opinion the writing is a libel, the court

(*x*) *Sturt v. Blagg*, 10 Q. B. 908.

(*y*) *The Capital and Counties Bank v. Henty*, 7 App. Cas. 744 ; 52 L. J. Q. B. D. 234, per Lord Selborne, C.

(*z*) *Tuson v. Evans*, 12 A. & E. 733 ; *Levi v. Milne*, 4 Bing. 195 ; *Reeves v. Templar*, 2 Jur. 137.

(*a*) *Levi v. Milne*, 4 Bing. 195 ;

12 Moore, 421 ; *Hakewell v. Ingram*, 2 C. L. Rep. (1854), p. 1397.

(*b*) *Hearne v. Stowell*, 12 A. & E. 719, 732.

(*c*) *Parmiter v. Coupland and another*, 6 M. & W. 105 ; *Baylis v. Lawrence*, 11 A. & E. 920.

does not think it made out to be a libel; is a question which CHAPTER XIX.
has recently undergone considerable discussion, and was the subject of very learned and elaborate arguments and judgments in a recent case in the House of Lords (*d*); in which it was held,—affirming the judgment of the majority of the Court of Appeal—that the Court has such power; and that the principle upon which the Court should proceed is—that unless the plaintiff has so far satisfied the *onus* which lies on him to show it to be a libel, that the court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say (*e*).

In the case of *Levi v. Milne* (*supra*), the defendant published some doggerel verses describing, in ludicrous narrative, the proceedings of the plaintiff, a sheriff's officer, in attempting to arrest a party on a *capias*: the verses were headed by a woodcut descriptive of the scene, and the plaintiff was styled throughout—"L—y the Bum." The presiding judge directed the jury that the article in question being calculated to render the plaintiff ridiculous, and to occasion pain to his feelings, was clearly a libel. The jury inquired whether a shilling would carry costs, and being answered in the affirmative, found for the defendant. The court set aside the verdict, and directed a new trial. And Best, C.J., in the course of his judgment, said, that if the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from an arbitrary decision. In the present case the jury had taken upon themselves to find a verdict on the law of the case in direct defiance of the ruling of the judge, and therefore their verdict must be set aside (*f*).

In the case of *Hearne v. Stowell* (*g*) a distinction was taken between libel and slander, in the course of the argument on showing cause against a rule for arresting judgment. It was contended that under the Libel Act (*h*) all questions as to whether the matter charged is, or is not libellous, are to be expressly referred to the jury; and that the court could have no power, after the verdict of the jury, to arrest the judgment in actions for libel, because such questions were wholly removed by the Libel Act from the cognizance of the court, and

(*d*) *The Capital and Counties Bank v. Henty*, 7 App. Cas. 741; 52 L. J. Q. B. D. 232.

(*e*) *Ibid.*, 7 App. Cas. 782; 52 L. J. 254, per Lord Blackburn.

(*f*) *Levi v. Milne*, 4 Bing. 195 12

Moore, 418; *Hakewell v. Ingram*, 2 C. L. Rep. (1854), p. 1397 (Maule, J., *dissentiente*).

(*g*) 12 A. & E. 719.

(*h*) 32 Geo. III. c. 60.

When Verdict
of Jury will be
set aside.

CHAPTER XIX. exclusively submitted as matters of fact, to the jury. But as to those propositions, the court expressed dissent, and held that a plaintiff, in order to support his verdict, must be able to show that there is a libel charged upon the record; that to entitle a plaintiff to judgment it is not enough to charge malicious motives and a calumnious tendency: the facts and circumstances that give a sting to a publication apparently innoxious should be brought to the notice of the court; for the court will not direct judgment against the defendant, either on an indictment or in an action, without seeing that a libel has been published by him. And after verdict for the plaintiff, judgment was arrested, on the ground that the publication was not, on the face of it, libellous; and the court refused, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of any injury to the plaintiff which the declaration did not show, though some evidence to that effect was in fact given (i).

When Judge
may withhold
Case from jury.

The judge should not withhold the case from the jury unless he can clearly see, upon the face of the record, that the matter charged cannot in any way be libellous (k). It is only when the judge is satisfied that the publication cannot be a libel, and that if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognisance (l). But where, in the opinion of the judge, the words, in their ordinary sense and meaning, do not convey any defamatory imputation, and are not shown by the evidence to be capable of the libellous construction put upon them by the innuendo, he is justified in directing a nonsuit (m); or a verdict for the defendant (n).

The manner of
the publication
is material.

Independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in deter-

(i) *Hearne v. Stowell*, 12 A. & E. 719. See the observations of Lord Blackburn, on this case, 7 App. Cas. 778; 52 L. J. Q. B. D. 252.

(k) *Fray v. Fray*, 17 C. B. (N. S.) 603; and see *Teacy v. McKenna*, Ir. R. 4 C. L. 374.

(l) See per Kelly, L.C.B., *Cox v. Lee*, L. R. 4 Ex. 288.

(m) *Mulligan v. Cole and others*

L. R. 10 Q. B. 549; 44 L. J. 153. The judgment in this case was quoted with approval by Lord Blackburn, in a recent case in the House of Lords, see 7 App. Cas. 782; 52 L. J. Q. B. D. 254; and see *Nevill v. Fine Arts, &c. Ins. Co.* (1897), A. C. 68.

(n) *Hunt v. Goodlake*, 43 L. J. C. P. 54; *O'Brien v. Marquis of Salisbury* 54 J. P. 215.

mining whether the writing is calculated to convey a libellous imputation (o). CHAPTER XIX.

The question as to the fairness of a report of the proceedings of the court of justice is for the jury, not the judge (p); and so also as to whether or not a report of proceedings before a magistrate, with comments thereon, is a fair report or a garbled one; and the plaintiff has a right to the opinion of a jury thereon. And therefore, if in such a case the judge, instead of submitting the question to the jury, takes upon himself to decide as to the fairness or unfairness of the report, and rules that there is no case to go to the jury, and directs a verdict for the defendant, the court will set aside the verdict, and order a new trial (q). Questions of fairness of report of judicial proceedings are for the jury.

When a matter of fact is to be excused as comment upon another fact, the fact alleged and sought to be excused must be a reasonable inference from the facts alleged, and upon which it is a comment. Whether the matter complained of is capable of being reasonably inferred from such other facts is a question of law, just as on the trial of an indictment it is for the judge to say whether the guilt of the prisoner can be reasonably inferred from the facts proved. If not it is his duty to withdraw the case from the jury and direct a verdict of not guilty. If on the other hand, it be capable of being inferred, the question whether in the particular case it ought to be inferred, is for the jury (r). Comments upon matters of fact : when justifiable.

Comment in order to be fair must be based upon facts; if therefore a defendant cannot show that his comments contain no misstatements of fact, he cannot support his defence of fair comment. If he makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair (s). Misstatements.

(o) See per Lord Blackburn, 7 App. Cas. 771; 52 L. J. Q. B. D. 248.

(p) *Risk Allah Bey v. Whitehurst and others*, 18 L. T. (N. S.) 615, per Cockburn, L.C.J.

(q) *Street v. The Licensed Victuallers'*

Society, 22 W. R. 553.

(r) *Lefroy v. Burnside* (No. 2), L. R. (Ir.), 4 Ex. D. 566.

(s) *Vide Digby v. The Financial News, Ltd.*, 1 K. B. (1907) 502, C. A.

CHAPTER XX.

COSTS, IN ACTIONS OF SLANDER AND LIBEL.

New law and practice as to Costs.
Discretion of the Court as to.
Appeal as to Costs.
Order depriving successful party of Costs.
Costs under the County Courts Acts.
Costs where several issues.
Costs on joinder of different causes of action.

Apportionment of Costs where actions of libel consolidated.
Costs where action referred to arbitration.
Costs where an apology and payment into Court.
Security for Costs.

CHAPTER XX. THE law and practice as to costs, in actions and other proceedings on the civil side in the High Court of Justice, have been materially altered by the Judicature Acts, and the Orders and Rules of the Supreme Court made in pursuance thereof.

Law and practice as to Costs. Subject to the provisions of those Acts, and the Rules and Orders aforesaid, the costs of and incident to all proceedings in the Supreme Court . . . are in the discretion of the Court or Judge . . . Provided that where any action, cause, matter, or issue is tried with a jury, the costs must follow the event, unless the judge by whom such action, cause, matter, or issue is tried shall, for good cause, otherwise order (a).

By section 33 of the Judicature Act, 1875 (as amended by 46 & 47 Vict. c. 39), "any enactment inconsistent with this Act, or the principal Act," is repealed. It has been held, that the effect of that section is, that any prior enactment as to costs which is inconsistent with the Judicature Acts and the Rules of the Supreme Court made in pursuance thereof, must be taken to be abrogated (b).

And so in an action of libel, in which the jury found a verdict for the plaintiff with nominal damages, and the judge at the trial refused to certify for costs; it was held, that the plaintiff was entitled to his costs (c). Costs follow the event, regardless of the amount of damages, unless the court or judge orders to the contrary.

(a) R. S. C. 1883, Ord. LXV., r. 1.

(c) *Parsons v. Tinling*, 2 C. P. D.

(b) *Garnett v. Bradley*, 3 App. Cas. 119; 46 L. J. 230.
 956; 48 L. J. Q. B. D. 191.

By section 49 of the Judicature Act, 1873, no order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order. It has been held that this section is directory only, and not prohibitory, so far as relates to actions, &c., tried before a single judge. And where an action has been tried with a jury, a Divisional Court has power in its discretion, co-ordinate with that of the judge at the trial, to make an order to deprive a successful party of his costs. But no court should act on that power except on the consideration that some fact exists, amounting to "good cause," to induce the court to supersede the general presumption in favour of the successful party (*d*).

CHAPTER XX.
Appeal as to costs.

Order depriving successful party of costs.

"Good cause" embraces everything for which the party is responsible connected with the institution or conduct of the action, and calculated to occasion unnecessary litigation and expense. An order made by the judge depriving a plaintiff of costs is final, if made on considerations such as those above stated; but is subject to appeal if made on grounds which do not constitute good cause (*e*).

"Good cause," what is.

In exercising the jurisdiction given by the R. S. C. to deprive a successful party of costs, on "good cause" shown, the judge may consider, not only the plaintiff's conduct during the litigation, but also his conduct in connection with the circumstances which conduced to the action being brought. And although he may dissent from the verdict, he must not overrule the finding of the jury on the facts. And so, in an action to recover damages for a libel contained in a private letter, the jury found a verdict for the plaintiff, with £10 damages: and the judge, on the application of defendant's counsel, and on the ground that the plaintiff's own conduct had led to the libel being written, gave the plaintiff judgment for the damages, but without any costs: and the judgment was approved and upheld by the Court of Appeal (*f*).

It appears, therefore, by the Judicature Acts and Rules above stated, and the effect given to them by the decision of

(*d*) *Myers v. Defries and others*, 4 Ex. D. 176; 48 L. J. 446; *Siddons v. Lawrence*, *Ibid.*, and see *Bowey v. Bell*, 4 Q. B. D. 95; 48 L. J. Q. B. D. 161; *Brooks v. Israel*, *Ibid.*; *North v.*

Bilton, *Ibid.*

(*e*) 14 App. Cas. 26; 58 L. J. Q. B. D. 305.

(*f*) *Harnett v. Viss and wife*, 5 Ex. D. 307; 29 W. R. 7.

CHAPTER XX. the House of Lords in the case of *Garnett v. Bradley* and subsequent cases, that the prior enactments as to costs, if not expressly repealed, are virtually so ; and the court and judge have now an almost absolute discretion as to costs. But the law, as it was prior to the Judicature Acts, will still apply in some cases, in the absence of any order to the contrary by the court, or judge at the trial.

Costs under
the County
Courts Acts.

By the " County Courts Act, 1888 " (g), with respect to any action brought in the High Court, *which could have been commenced in a county court* ; if in an action founded on tort, the plaintiff recover a sum less than £10, he shall not be entitled to any costs of the action ; and, if he recover a sum of £10 or upwards, but less than £20, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court ; unless in any such action, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court, or a judge thereof at Chambers, shall by order allow costs.

The corresponding section of the County Courts Act, 1867 (h) (since repealed), has been held to apply to actions of slander, though they cannot be commenced in a County Court (i), and the latter circumstance is to be taken into consideration by the court or a judge in exercising their discretion under that section (k). And where, in an action for slanderous words uttered by the female defendant, commenced and tried in a superior court, a verdict was found for the plaintiff for £10, and the judge refused to certify : On an application to the court for costs, it was held, that, assuming the section to apply to cases in which the County Court had no jurisdiction, as the plaintiff had recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander, and as he could not have sued in the County Court, he ought to be allowed his costs ; and the rule was made absolute accordingly (l).

Costs where
several issues.

By R. S. C., (m), when issues in fact and law are raised

(g) 51 & 52 Vict. c. 43, s. 116, sub-s. 2.

(h) 30 & 31 Vict. c. 142, s. 5 ; and 45 & 46 Vict. c. 57, s. 4, both now repealed by the County Courts Act, 1888.

(i) See *Sampson v. Mackay*, 38 L. J. Q. B. 245 ; *Craven v. Smith*, L. R. 4

Ex. 146.

(k) *Sampson v. Mackay*, 10 B. & S. 694.

(l) *Gray v. West and wife*, L. R. 4 Q. B. 175 ; 38 L. J. Q. B. 78 ; *Kent v. Lewis*, 21 W. R. 413.

(m) Ord. LXV., r. 2.

upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event (*n*). The effect of this rule is, to give the court or judge a discretionary power (as in rule 1) over the costs where there are several issues. But, when not otherwise ordered, the costs are to "follow the event." In which case, where the plaintiff succeeds on some issues and the defendant on others, the costs of particular issues must be taxed in favour of the party who has succeeded on them.

The term "event," in this rule, will be construed distributively. And therefore, where by the statement of claim, or defence, or other pleading, more than one definite issue is raised and determined; upon one of which the plaintiff obtains a verdict and judgment, and upon another the defendant obtains the like, there are two "events"; and in the absence of any order to the contrary, the master must tax the costs accordingly. There, may, however, be cases in which the issues raised at the trial are so subordinate to the real event of the action, or so indefinite, that a master might properly say,—“Although there have been many issues, there has been but one event.” In such cases a direction as to the costs should be obtained at the trial, from the judge who tries the case (*o*).

Where two or more actions of libel brought by one and the same person against two or more defendants, have been consolidated, under the Law of Libel Amendment Act, 1888 (*p*), the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants (*q*).

In actions for words imputing unchastity or adultery to any woman or girl, under the Slander of Women Act, 1891, a plaintiff cannot recover more costs than damages, unless the judge certifies that there was reasonable ground for bringing the action (*r*).

Where in an action of libel the cause was compromised after notice of trial, by the defendant agreeing to apologise and pay

Apportionment of Costs, where actions of libel consolidated.

Costs under the Slander of Women Act, 1891.

Compromise by apology and agreement to pay Costs.

(*n*) Prior to the Jud. Act, 1873, the rule was, that when issues in law and fact were raised, the costs of the several issues in law and fact followed the finding or judgment. Rule 62, H. T. 1853 (now repealed), made under the C. L. P. Act, 1852.

(*o*) *Vide Myers v. Defries*, 5 Ex. D. 18, and *Ibid.* (on App.) 184; 49 L. J. 268.

(*p*) 51 & 52 Vict. c. 64, s. 5.

(*q*) *Vide Hoplay v. Williams*, 6 T. L. R. 3.

(*r*) 54 & 55 Vict. c. 51.

CHAPTER XX. the plaintiff's costs as between attorney and client, the court enforced performance of the agreement (*s*). So also in an action of slander (*t*).

Set-off for damages, or Costs.

A set-off for damages or costs between parties, may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (*u*).

Costs of photographic copies of alleged Libels.

The costs of inspecting and taking photographic copies of alleged libels must, in any event, be borne by the party requiring them. But the costs of the rule to show cause why such inspection should not be allowed will, in general, be costs in the cause (*x*).

Security for Costs.

In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form as the court or a judge shall direct (*y*). A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction (*z*).

By Foreigner, Plaintiff, resident abroad.

When the plaintiff in an action of libel is a foreigner, and resident abroad, the defendant may obtain an order to compel the plaintiff to find security for costs : but in a case in which security to the amount of £400 had been given, the court refused to increase it, notwithstanding an affidavit that the expenses of obtaining the evidence of witnesses resident abroad would greatly exceed that sum (*a*).

Costs of Appeal ;

The Court of Appeal, under the Judicature Acts, has power to make such orders as to the whole or any part of the costs of the appeal as may be just (*b*). A successful appellant will, as a general rule, have his costs of the appeal (*c*).

general rule as to.

(*s*) *Riley v. Byrne*, 2 B. & Ad. 779.

(*t*) *Turdrew v. Brook*, 5 B. & Ad.

880.

(*u*) R. S. C., Ord. LXV., r. 14.

(*x*) *Darey v. Pemberton*, 11 C. B. (N. S.) 629.

(*y*) R. S. C., Ord. LXV., r. 6.

(*z*) *Ibid.*, r. 6, A.

(*a*) *Pizani v. Lawson*, 5 Scott, 418.

(*b*) R. S. C., Ord. LVIII., r. 4.

(*c*) *Olivant v. Wright*, 45 L. J. Ch. p. 1, and see *Garnett v. Bradley*, 3 App. Cas. 944 ; 48 L. J. Q. B. D. 200.

CHAPTER XXI.

INJUNCTIONS TO RESTRAIN LIBELLOUS PUBLICATIONS.

Grounds of Jurisdiction, and recent practice as to.

Result of authorities as to jurisdiction.

Jurisdiction under the Judicature Act.

Interlocutory injunctions, difficulty as to framing.

Exceptional caution to be used.

Injunction refused when indictment the proper remedy.

To restrain publication of matter injurious to property, &c.

In the case of Trade Circulars, &c.

To restrain Slander of Title.

To restrain false statements of a candidate for Parliament.

To restrain the publication of letters.

THE jurisdiction to restrain, by injunction, the publication of libellous matter on the ground of injury to character and reputation, is of recent assertion (a); conferred (it has been said) by certain repealed sections of the Common Law Procedure Act, 1854 (b), and by the Judicature Act, 1873. Independently, however, of the latter statute, there is no principle of law nor rule of equity upon which to found such a jurisdiction. The ground upon which the court is empowered to interfere before trial, in the case of a false and injurious publication, is in the protection of *property*: and therefore, where a publication (whether libellous or not) is calculated to inflict some immediate wrongful and substantial injury to the property or manufactures of the plaintiff, it may be restrained by interlocutory injunction.

The court may, therefore, restrain a publication on the ground that it is injurious to property, but not on the ground that it is a libel. Whether libel or not the court has no jurisdiction to determine; nor whether, if conditionally privileged, it was published maliciously; as those are questions of fact to be found by a jury.

It has, however, been the practice of late years for the High Court of Justice in ordinary actions of defamation, to issue an injunction either before or after trial, to restrain the publication of libels, though not falling within the rule above stated; on the ground, merely of their tendency to the injury of character and reputation: but even such is a questionable

(a) (1882) *Quartz Hill Consolidated Gold Mining Co. v. Beall*, 20 Ch. D. 501; 51 L. J. 874.

(b) Secs. 79, 81, and 82.

CHAPTER XXI. jurisdiction, not only as regards the alleged statutory power, but as being in direct conflict with the current of previous judicial authority.

The Court of Chancery, as it existed prior to the Judicature Act, 1873, had no jurisdiction to interfere by injunction to stay the publication of a libel, as such; for it was said by high authority—"The publication of a libel is a crime; and the Court of Chancery has no jurisdiction to prevent the commission of crimes" (c). And therefore, whether it was a libel against the public, or of any private person, the only remedy was to proceed at law; the Court of Chancery had no cognizance of it; unless it was a contempt of that court by being an abuse of its proceedings (d); or, unless it was destructive of, or injurious to, the property of another (e). So also it was held, that the Court of Chancery had no jurisdiction to restrain the publication of a letter, as being painful to the feelings of the writer (f). Nor of a work tending to impugn the doctrines of the holy Scriptures (g), nor of a work of a blasphemous, obscene, or immoral nature (h), such publications being properly the subject of indictment.

And where an application was made on behalf of the trustees of a building society and deposit bank, for an interlocutory injunction to restrain the publication and sale by the defendant of a book containing paragraphs alleged to be untrue and libellous, impugning the balance-sheets of the society and the calculations on which they were based, and, as alleged, likely to affect the credit and stability of the society; the application was refused (i).

It has, however, been ruled, that although the Court has no jurisdiction to prevent the commission of acts on the ground that they are criminal, yet the Court may restrain such as tend to the destruction or to the deterioration of the value of property; notwithstanding that they are also of a criminal nature, and punishable as a statutable offence (k). And the same learned judge also ruled in a subsequent case, that a

(c) 2 Swanst. 413, per Lord Eldon, C.

(d) See per Lord Chancellor Hardwicke, 2 Atkyns, 469.

(e) *Clark v. Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; and *vide Martin v. Wright*, 6 Sim. 297; *Seeley v. Fisher*, 11 Sim. 581, per Lord Cottenham, C.

(f) *Gee v. Pritchard*, 2 Swanst. 413.

(g) *Laurence v. Smith*, 1 Jacob, 471.

(h) *Ibid.*, and see *Walcot v. Walker*,

7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 439; *Stockdale v. Onwhyn*, 5 B. & C. 173.

(i) *Mulkern v. Ward*, L. R. 13 Eq. 619; 41 L. J. Ch. 464, per Wickens, V.-C.; see *Hill v. Hart-Davis*, 21 Ch. D. 798; 51 L. J. 845, per Kay, J.

(k) *The Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; 37 L. J. 889, per Malins, V.-C.

court of equity has jurisdiction to restrain the publication of any letter, advertisement or other document tending to the destruction of property, whether consisting of money or of *professional reputation* by which property is acquired: and accordingly, an injunction was granted restraining the publication of libellous advertisements reflecting on the reputation and mercantile credit of the plaintiff (*l*). But in a subsequent case before the full Court of Appeal (*m*), both those decisions were expressly overruled, as being at variance with the settled practice and principles of the Court of Chancery; and it was held, that the court had no jurisdiction to restrain the publication of a libel, as such, even if it be injurious to property (*n*). In that case the defendant had published a pamphlet entitled "Solvent Life Offices and others, or What becomes of Ten Millions a Year." It was alleged that the pamphlet contained statements injurious to the plaintiff company's credit and reputation, and tended greatly to damage their business and diminish their profits. The plaintiffs applied for an injunction, which was refused by Hall, V.-C.: and on appeal, the decision of that learned judge was upheld; Lord Cairns, C., observing in the course of his judgment, that the comments and expressions contained in the pamphlet either amounted to a libel or they did not: that if not libellous they were lawful: and if libellous it was only because they were so that the court was asked to restrain them: that not only was there no authority for such an application, but on the contrary, it was clear from the authorities cited, that the Court of Chancery had no jurisdiction to restrain the publication of a libel because it was a libel; that there were publications which the court would restrain where there was a foundation for the jurisdiction, and in such cases they would not be restrained the less because they happened also to be libellous; and James and Mellish, L.JJ., expressed their entire concurrence in the judgment of the Lord Chancellor (*o*).

It appears, therefore, that (independently of the statutes cited) (*p*), both upon principle and authority, the jurisdiction rests on injury to *property*, such injury being actual or

Result of
authorities as
to jurisdiction.

(*l*) *Dixon v. Holden*, L. R. 7 Eq. 488; 17 W. R. 482. See *Clover v. Royden*, 43 L. J. Ch. 665; L. R. 17 Eq. 190.

(*m*) Cairns, C., James and Mellish, L.JJ.

(*n*) *The Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; 44 L. J.

Ch. 192.

(*o*) *Ibid.*; and see per Lord Campbell, C., *The Emperor of Austria v. Day and another*, 3 De G. F. & J. 238; 30 L. J. Ch. 690, 706.

(*p*) C. L. P. Act, 1854, and Judicature Act, 1873.

CHAPTER XXI.

Jurisdiction
under the
Judicature
Act.

prospective : but where the injury complained of is that of defamation of character only, there is no principle of law nor rule of equity conferring jurisdiction to restrain it by injunction. Where, however, the publication is, or would be if persisted in, injurious to property, or if it amounts to a contempt of Court, it may be restrained by interlocutory injunction ; and not the less so because it is also libellous.

It was, however, held by the Court of Appeal (g) that the High Court of Justice has power to restrain by interlocutory injunction, the publication of a libel, however "atrocious" it may be (r). A jurisdiction said by Jessel, M.R., to have been conferred on the Common law courts by the Common Law Procedure Act, 1854 (s). That by the Judicature Act, 1873, all jurisdiction which was vested in any of the courts therein mentioned (including the Common law courts) was transferred to the High Court of Justice, of which the Chancery Division forms part : and that by section 25, sub-sec. 8, an injunction may be granted by an interlocutory order of the court, in all cases in which it shall appear to the court to be "just or convenient" that such order should be made. "That being so" (continues the learned judge), "in my opinion, having

(g) Jessel, M.R., *Baggallay and Lindley, L.JJ.*

(r) *Quartz Hill Consolidated Gold Mining Co. v. Beall*, 20 Ch. D. 501 ; 51 L. J. 874.

(s) Secs. 79, 81, and 82 (repealed by 46 & 47 Vict. c. 49). The object of these sections of the C. L. P. Act was, to facilitate the procedure of the Common Law Courts where, prior to that Act, in some cases, both of public as well as private wrongs, it was necessary in order to obtain complete relief, to have recourse to a Court of Equity : so that where previously to the C. L. P. Act, a Court of Equity would have granted an injunction, a Court of Common Law was thereby empowered to do so. The object of the statute was not to alter the law or the principles upon which prior to that statute, injunctions had been granted. And as to the construction put upon those sections of the C. L. P. Act, it appears from various decisions of the judges, after it came into operation, that the intention of the legislature was, that

the power thereby conferred upon the Common Law Courts, of granting injunctions, should be exercised upon the same principles as those hitherto adopted by Courts of Equity. And, as already shown (*), such Courts had no jurisdiction to issue injunctions, interlocutory or otherwise, to restrain the publication of libels. And, accordingly, during the twenty years or more in which the C. L. P. Act was in full operation, by and before the Judges who were, in fact, the framers of it, sitting day by day administering the law and procedure under it, not a single case is to be found in the books nor in the Records of the Court, of the granting of an injunction to restrain the publication of a libel. There are indeed reports of cases, the judgments in which go far to negative the idea of any such extension of jurisdiction by the C. L. P. Act, beyond that possessed by the Courts of Equity. *Vide Gittins v. Symes*, 24 L. J. C. P. 48 ; *Benson v. Paull*, 8 E. & B. 265 ; 25 L. J. Q. B. 274.

(*) *Supra*, pp. 326, 327.

regard to these two Acts of Parliament, I have *unlimited* CHAPTER XXI.
power to grant an injunction in any case when it would be right or just to do so, according to settled legal reasons or on any legal settled principle" (t). That "in the case of an *atrocious* libel wholly unjustified, and inflicting serious injury on the plaintiff, it would be quite proper to restrain the further publication of it" (u).

In a subsequent case, an injunction to restrain the publication in a newspaper, of future articles, &c., reflecting unfavourably on a company, was refused on the ground of the difficulty of so framing an injunction as not to include matters other than those which might be libellous; and because, if granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit (x). And Cotton, L.J., in the course of his judgment, observed—"It would be very dangerous to grant an interlocutory injunction with reference to future publication, unless we could lay down definitely some line, the crossing of which would of necessity make the publication libellous." That "it would be very unadvisable to grant any injunction which would restrain the fair discussion in the newspapers of matters of importance, like that of the probable success or failure of a public company" (y).

"To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it is a libel or not." Doubtful nature of the jurisdiction.

(t) *Vide* *Beddow v. Beddow*, 9 Ch. D. 92; 47 L. J. 590, per Jessel, M.R.

(u) *Quartz Hill, &c. Gold Mining Co. v. Beall*, *supra*. NOTE.—It is humbly submitted that the granting of an injunction before trial, to restrain the publication (in a newspaper) of an alleged libel, cannot be either "just or convenient"; on the contrary it would be prejudging the case in a manner that is contrary to law; for the question of libel or no libel is for the jury, not the Court; and so also the question of malice, where malice is essential to sustain the action: and, admitting the publication to be injurious to character, yet if it be true the action must fail, for such a defence, if established to the satisfaction of the jury, is a complete answer to an action of libel. The granting of an interlocutory in-

junction would therefore be contrary to the "established principles and practice of the courts": moreover, in the case of a newspaper, it would be putting a restraint upon the press that would be contrary to law; and in the case suggested by the learned judge, of "an atrocious libel"; an injunction would be an inappropriate remedy; more prompt and effective procedure being provided for such a case in the criminal courts.

(x) *Liverpool Household Stores Association v. Smith*, 37 Ch. D. 170; 57 L. J. 85.

(y) *Ibid.*, 37 Ch. D. 180; 57 L. J. 91; and see *Mogul Steamship Co. v. McGregor & Co.*, 15 Q. B. D. 476; 54 L. J. 540; *Armstrong and others v. Armit and others*, 2 Times L. R. 887, per Lord Coleridge, C.J., and Denman, J.

CHAPTER XXI. Therefore the jurisdiction is of a 'delicate nature'; and ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable" (z).

Exceptional
caution to
be used.

And it was stated by Lord Coleridge, C.J., in delivering the judgment of the Court of Appeal, in another case, that the court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel: but that the exercise of the jurisdiction is discretionary, and such as to require "*exceptional caution in the use of it*"; particularly in the case of an interlocutory injunction: and his Lordship expressed his approval of and desire to adopt as his own the language of Lord Esher, M.R., in the above case of *Coulson v. Coulson*; that the subject-matter of an action for defamation is so special as to require "exceptional caution" in exercising the jurisdiction; and further, that it would be wiser in the case then before the court, "as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification" (a). And moreover, that an interlocutory injunction should not be granted when the defendant states upon oath that he will be able to justify the libel, and the court is not satisfied that he may not be able to do so. Nor where there is a conflict of testimony as to the truth of the alleged libel; nor *à fortiori*, where it appears by affidavits, that the plaintiff himself was privy to the publication; or that he encouraged, acquiesced in, or in any way assented to it (b).

Injunction
refused when
Indictment
the proper
remedy.

Nor, indeed, in any case unless the court can see that there is such immediate and pressing injury to person or to property, threatened by the defendant, as to make it desirable or right that an interlocutory injunction should be granted (c). And therefore, where the defendant, after verdict and judgment against him for libel, with heavy damages, continued persistently to publish repetitions of the libel, containing charges against the plaintiff of fraud, perjury and conspiracy; the court (in a subsequent action) refused to grant an injunction; and left the plaintiff to his more appropriate remedy by indictment (d).

(z) *Coulson v. Coulson*, 3 Times L. R. 846, per Lord Esher, M.R.

(a) *Bonnard v. Perryman* (1891), 2 Ch. 269, 284; 60 L. J. 617.

(b) *Monson v. Tussauds* (1894), 1 Q. B. 671, 694, 697; 63 L. J. 454.

(c) *Salomons v. Knight* (1891), 2 Ch. 294; 60 L. J. 743; *Lee v. Gibbings*, 67 L. T. 263.

(d) *Ibid.*; and *vide The Law Magazine*, vol. 22, p. 63.

And where the plaintiff sued, in the Chancery Division, the editor, proprietor and publisher of a newspaper, in an action of libel, and claimed an interlocutory injunction, the court refused to entertain the application; and said the action ought to be forthwith transferred to the Queen's Bench Division (e). CHAPTER XXI.
Actions of libel not to be brought in Chancery Division.

Publications injurious to property.—The jurisdiction to grant injunctions to restrain the publication of matter injurious to property, trade and manufactures, stands on a different footing. The court will, in its discretion, in a proper case, grant an injunction either on interlocutory application, or at the hearing of the action, restraining the defendant from slandering the title of the plaintiffs to, and publishing a libel upon, a commodity of their manufacture or invention (f). So too, an injunction was granted restraining the circulation of a trade-letter which imputed that the plaintiff's goods were spurious; and it was held to be unnecessary to prove actual damage (g). But in the case of what is termed "a trade libel," whether the remedy sought be injunction or damages, an actionable wrong must be shown, as well as special damage (h). To restrain the publication of matter injurious to property, trade, manufactures, &c.

Where the injury was shown to be of a threatening and continuing character, injurious to the trade and manufactures of the plaintiff; and the publication one which, in the opinion of the court, it should immediately restrain; an interlocutory injunction was granted before delivery of the statement of claim (i). But where there is a subsisting contract between the plaintiff and the defendant as to a certain manufacture, and the defendant in pursuance thereof, *bonâ fide* issues a trade circular, an interim injunction will not be granted to restrain it, unless it is in violation of the contract; however much the balance of convenience may be in favour of granting it (k).

And it has been held, that in the case of libellous placards and other defamatory publications by Trade Union Societies, where the object is to intimidate workmen, to defame employers Trade Union publications.

(e) *Plumbly v. Perryman and others*, W. N. (1891), p. 64.

(f) *Thorley's Cattle Food Co. v. Massam*, 6 Ch. D. 582; 46 L. J. 713, per Malins. V.-C., affirmed on appeal, 14 Ch. D. 763.

(g) *Thomas v. Williams*, 14 Ch. D. 864; 49 L. J. 605, per Fry, J.

(h) *White (App.) v. Mellin (Resp.)*

(1895), App. Cas. 154; 64 L. J. Ch. 308 (H. L.), and see *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, *supra*, p. 83.

(i) *Punch v. Boyd and others*, L. R. (Ir.), 16 Q. B. D. 476.

(k) *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent &c., Co.*, 25 Ch. D. 1; 53 L. J. 1.

CHAPTER XXI. and provoke disaffection; or to foster discontent and encourage hostility against employers; the court will, in its discretion, grant an interlocutory injunction (l).

In the case
of Trade
Circulars.

An injunction was granted restraining the publication of a trade circular, by a rival manufacturer (containing untrue statements as to the effect of a judgment in an action between such rival manufacturers) on the ground that it was a publication injurious to the plaintiff's business (m). But a mere puffing advertisement, stating that the advertiser's goods are better than those of any other manufacturer, affords no ground for an action, nor for an injunction (n).

No trader is, however, entitled to pass off his own goods as those of another trader, by selling them under a name that is likely to deceive purchasers (o).

Circular dis-
paraging a
Company.

The court refused an injunction to restrain the publication, amongst shareholders, of a circular, though containing very disparaging statements and comments on a mining company then recently floated; there being no proof that the statements were untrue, nor of any intention on the part of the defendant to continue the publication of the circular, and the same being also *prima facie* privileged (p). But an injunction was granted to restrain the publication in a weekly serial termed "The Money Maker," of a statement to the effect that the plaintiffs' bank was in liquidation (q).

To restrain
verbal state-
ments in-
juriously
affecting
property.

It has been held that the principles upon which the publication in writing of matter injuriously affecting the property or trade of the plaintiff may be restrained, apply also in the case of verbal statements; and that an injunction may be granted to restrain oral defamation, where it affects parties in their property, trade or business. But that the jurisdiction in such cases must be exercised with great caution. And so where

(l) *Vide Pink v. The Federation of Trades and Labour Unions, &c.*, 67 L. T. 258; *Trollope & Sons v. The London Building Trades Federation*, 72 L. T. 342; *Collard and another v. Marshall and another* (1892), 1 Ch. 571; 61 L. J. 268; *Newton v. Amalgamated Musicians' Union* (1896), cor. Chitty, J., 12 Times L. R. 623.

(m) *Hayward & Co. v. Hayward & Sons*, 34 Ch. D. 198; 56 L. J. 287; *Anderson v. Liebig's, &c., Co.*, 45 L. T. 757; *Liebig's, &c., Co. v. Anderson*, 55 L. T. 206, cor. Chitty, J.

(n) *White (App.) and Mellin (Resp.)*

(1895), App. Cas. 154; 64 L. J. Ch. D. 308 (H. L.); *Hubbuck v. Wilkinson and others*, C. A. (1899), 1 Q. B. 86.

(o) *Reddaway and others (Apps.) and Banham and others (Resps.)* (1896), App. Cas. 199.

(p) *Quartz Hill, &c., Gold Mining Co. v. Beall, supra.* And *ride Burnett v. Tate*, 45 L. T. 743, W. N. (1882), p. 8; *Poulett v. Chatto, Windus, and another*, W. N. (1887), 192, 230.

(q) *Per North, J., London and Northern Bank v. Newnes* (1899), 16 T. L. R. 76.

the defendant, who had been dismissed by the plaintiff company, in whose employment he had been as agent; after his dismissal made slanderous statements to the company's customers as to the solvency of the company, and otherwise reflecting on their trade and business: it was held, that such statements, though merely oral, might be restrained by injunction (*r*).

And an injunction may be granted in a proper case, in an action for slander of title, whether to real or personal property (*s*). But there is no property in the *name* given to an estate, or a house: consequently an injunction will not be granted to restrain an adjoining proprietor from giving the same name to his house and premises as that given to his neighbour's (*t*).

But an injunction may be granted to restrain the unauthorised use of a man's name; if it be proved that such user has caused him injury to his property, business or profession, although such user be neither libellous nor defamatory (*u*).

By the Patents, Designs and Trade Marks Act, 1883 (*x*), where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person aggrieved thereby may bring an action, and obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby; if the alleged manufacture, &c., to which the threats related, was not in fact an infringement of any legal rights of the person making such threats: But the section is not to apply if the person making such threats, with due diligence commences and prosecutes an action for infringement of his patent (*y*).

The "threats" referred to in the section above stated include threats by private or solicitor's letter, to the person charged with infringement (*z*). And the "threat" must relate to some

(*r*) *Hermann Loog v. Bean*, 26 Ch. D. 306; 53 L. J. 1128; 32 W. R. 994.

(*s*) *Supra*, tit. "Slander of Title," p. 57, *Frere v. Vidler*, and p. 65, *Leslie v. Cave*.

(*t*) *Day v. Brownrigg*, 10 Ch. D. 294; 48 L. J. 173, and *supra*, p. 54.

(*u*) *Dockrell v. Dougal* (1899), 80 L. T. R. 556; *Hawker v. Stourfield*

Park Hotel Co. (1900), W. N. 51.

(*x*) 46 & 47 Vict. c. 57, s. 32.

(*y*) *Barney v. United Telephone Co.*, 28 Ch. D. 394; *Walker v. Clarke*, 56 L. J. Ch. D. 239.

(*z*) *Driffield, &c., Linseed Cake Co. v. Waterloo Mills Cake Co.*, 31 Ch. D. 638; 55 L. J. 391.

To restrain
Slander of
title.

To restrain
wrongful use
of a man's
name.

Statutory
power to
restrain
groundless
threats as to
patent rights.

CHAPTER XXI. infringement in the past, and not to a suggested infringement in the future (a).

On an application under the statute, for an interlocutory injunction, it is the duty of the applicant to make out a *prima facie* case as to the infringement, and (if he raises it) as to the validity of the patent (b).

To restrain threatened Contempts of Court.

Injunctions have been granted to restrain threatened contempts of court, as by the publication of circulars by parties to actions, containing a reprint of the statement of claim or other pleadings in the action, with comments thereon abusive of the other side (c). So also to restrain a preacher who had advertised his intention of preaching a sermon on the subject-matter of a pending action (d).

Statutory jurisdiction to restrain false statements of a candidate for parliament.

Under the Corrupt and Illegal Practices Prevention Act, 1895 (e), statutory power is conferred upon the High Court of Justice to restrain, by interim or perpetual injunction, the repetition of any false statement of fact in relation to the personal character or conduct of a candidate at a parliamentary election: and for the purpose of granting an interim injunction, *prima facie* proof of the falsity of the statement shall be sufficient (f).

To restrain the publication of letters.

A person who writes a letter to another, does not thereby give him the right to publish its contents to the world. The writer has a right to control the act of publication; and is entitled to an injunction to restrain the unauthorised publication, whether it be for profit or otherwise (g). It is not because the letters are written "in confidence," or because the publication of them may "wound the feelings of the writer" that the jurisdiction of the court in cases of the sort is founded (h). The *property* in letters remains in the person to whom they are sent; but the writer has this kind of *property* in them, that he has a right to restrain the publication of their contents: and the right descends to the legal personal representatives of the writer (i).

(a) *Challender v. Royle*, 36 Ch. D. 425; 56 L. J. 995; *Johnson v. Edge* (1892), 2 Ch. 1; 61 L. J. 262.

(b) *Challender v. Royle*, *supra*.

(c) *Kitcat v. Sharp*, 52 L. J. Ch. D. 134; *Bowden v. Russell*, 46 L. J. Ch. D. 414.

(d) *Mackett v. Commissioners of Herne Bay*, 24 W. R. 845; and *vide infra*, "Contempt of Court."

(e) 58 & 59 Vict. c. 40, s. 3.

(f) And see *Hayley v. Edmunds and others*, 11 Times L. R. 537.

(g) *Pope v. Curl*, 2 Atk. 341.

(h) 2 Swanst. 426, per Lord Eldon, C.

(i) *Thompson v. Stanhope*, Amb. 739; *Lytton (Earl of) v. Devey and others*, 54 L. J. Ch. 293.

It is only when it becomes necessary in the interests of public justice, or for the vindication of character from a false or malicious charge, that the receiver of a letter may publish it without the authority of the writer (*k*). CHAPTER XXI.

A Court of Equity will not grant an injunction to restrain an invasion of copyright in a libellous, or otherwise illegal publication, nor will it decree the performance of an agreement relating to, or an account of the profits of, any work of such a nature: for by the policy of the law, no person can have any property in such works (*l*). No property in libellous or other illegal publications.

An injunction will not be granted to restrain the continued or excessive publication of an apology, which has been given to prosecutors who had instituted criminal proceedings against the person making the apology. And notwithstanding that the prosecutors continued to publish the apology by way of advertisement for nearly two months, it was held, on demurrer to a bill for restraining the excessive publication, that there was neither principle nor authority for the court interposing to limit the publication of the apology (*m*). Excessive publication of apology.

CHAPTER XXII.

POINTS OF PRACTICE; AND PROCEEDINGS AFTER VERDICT.

Points of Practice:—

- „ where defendant resides out of jurisdiction.
- „ liability for Libel published out of jurisdiction.
- „ for slander spoken out of jurisdiction.
- „ staying proceedings whilst Costs of former action unpaid.
- „ consolidation of several actions for same libel.

Points of Practice:—

- „ contracts of indemnity against publication of libels.

Proceedings after Verdict:—

- „ motion for new trial; or to set aside verdict.

- „ grounds of application for.

Motion for Judgment.

Grounds for setting aside Judgment.

Points of Practice.—The court has jurisdiction under the R. S. C. (*a*), to make an order giving leave to a plaintiff, who resides within the jurisdiction, to issue a writ for service on a defendant who resides out of the jurisdiction, in an action in CHAP. XXII.

Where Defendant resides out of jurisdiction.

(*k*) See *Gee v. Pritchard*, 2 Swanst. 415; *Perceval v. Phipps*, 2 V. & B. 19.

(*l*) *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 435.

(*m*) *Fisher & Co. v. Apollinaris Co.*, L. R. 10 Ch. 297; 44 L. J. Ch. 500.

(*a*) Ord. XI., r. 1 (*f*).

CHAP. XXII.

which an injunction is sought, to restrain him from publishing libels on the plaintiff; although it may appear (*prima facie*) that the injunction, if granted, could not be enforced (*b*). And a plaintiff cannot acquire a right to serve a defendant out of the jurisdiction by the mere fact that his writ claims an injunction (*c*). If the plaintiff can prove publication in London, a cause of action will thereby have arisen within the jurisdiction, and an order giving leave for service should be made (*d*). An order for *substituted* service, where the defendant is resident out of the jurisdiction, will not be made in an action of libel (*e*), particularly if it appears that the claim for an injunction is inserted merely for the purpose of bringing the case within Order XI., when it otherwise would be outside it (*f*).

Liability for libel published out of jurisdiction.

A person may be liable to civil proceedings for libel on a plaintiff resident within the jurisdiction of the court, though the publication was out of the jurisdiction: as by a letter written and sent by the defendant from London to a mercantile firm at Sierra Leone, reflecting on the plaintiff's mercantile character and dealings (*g*). And an action will lie in this country, for a libel published in a foreign country, unless it can be shown to be justified or excused in such foreign country where it was published (*h*).

For slander spoken out of jurisdiction, causing damage within.

But a slander spoken out of the jurisdiction, by a British subject resident abroad, is not actionable in England, though causing the dismissal from office, by the employers in England, of the party slandered.

Death of Plaintiff or Defendant.

The general rule of the common law is, *actio personalis moritur cum personâ*; but where the action is for a wrong to personal estate the rule does not apply, for it appears that by the equity of the statutes 4 Ed. III. c. 7, and 31 Ed. III. c. 11, an executor or administrator shall have every action for a wrong done to the personal estate of his testator (*k*). The rule applies to actions for injuries to the person and reputation, as for assault, false imprisonment, libel, and slander: and

(*b*) *Tozier and wife v. Hawkins*, 15 Q. B. D. 680; 55 L. J. 152.

(*c*) *Watson & Sons v. Daily Record (Glasgow), Ltd.*, 1 K. B. (1907), 853, C. A.

(*d*) *Shearman v. Findlay*, 32 W. R. 122.

(*e*) *Field v. Bennett*, 56 L. J. Q. B. D. 89.

(*f*) *De Bernales v. New York Herald* (1893), 2 Q. B. 97 (*n*); 62

L. J. 385.

(*g*) *Ward and another v. Smith*, 6 Bing. 749.

(*h*) *Machado v. Fontes*, C. A. (1897), 2 Q. B. 231.

(*i*) *Brce v. Marescaux*, 7 Q. B. D. 434; 50 L. J. 676.

(*k*) Com. Dig. Adm. B. 13; Latch. 168; and *vide* 4 C. P. D. 40; 48 L. J. 2.

formerly it applied, notwithstanding that interlocutory judgment had been signed by default; as in a case where a writ of inquiry had been executed, and damages assessed, the plaintiff afterwards died before the next day *in banco*; it was held, that final judgment could not be entered, the suit having abated by the plaintiff's death (l). But that case is no longer law, it being provided by the R. S. C. (m) that whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

Where the libel or slander is injurious to property (as in the case of slander of title) as distinguished from a mere injury to reputation, the maxim *actio personalis moritur cum personâ*, does not apply; and the right of action survives to the plaintiff's executors (n). CHAP. XXII.
When the action survives.

Under the former procedure, where a plaintiff in an action of slander had once had an opportunity of trying the action upon its merits, and had consented to a nonsuit upon the merits, and afterwards brought a second action for, substantially, the same slander, leaving the costs of the former action unpaid; the court would, upon motion, interpose its authority by staying the proceedings (o). So in an action of libel, if the plaintiff elected to be nonsuit, it was in the discretion of the court as to whether another action would be allowed to be brought for the same libel until the costs of the first had been paid; and this, too, although the plaintiff should sue for the second action in a different court to that in which he sued for the first (p). And now, under the R. S. C. (q), if any subsequent action be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the court or a judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid. Staying proceedings whilst Costs of former action unpaid.

Where the plaintiff brought a second action for a libel contained in the same pamphlet, but upon different passages; it was held, that the action was an abuse of the process of the court; and an order made for striking out the Second action for same libel.

(l) *Ireland v. Champneys*, 4 Taunt. 884.

(m) Ord. XVII., r. 1.

(n) *Hutchard v. Mege and others*, 18 Q. B. D. 771; 56 L. J. 397.

(o) *Hoare v. Dickson*, 7 C. B. 164; 18 L. J. C. P. 158.

(p) *Prowse v. Lozdale*, 3 B. & S. 896; 32 L. J. Q. B. 227.

(q) Ord. XXVI., r. 4

CHAP. XXII. statement of claim and dismissing the action was affirmed on appeal (r).

A County Court judge has power, on the application of the defendant in an action of libel remitted to the County Court from a superior court, to stay all proceedings in the action until payment by the plaintiff of the costs of a prior action in the Superior Court in respect of the same cause of action, in which the defendant obtained judgment with costs (s).

Staying action brought in breach of faith.

And where a second action is brought in breach of good faith,—where it had been agreed that a rule for a new trial should be discharged and a *nolle prosequi* entered; the court stayed the proceedings in a fresh action brought upon the same facts (t). But where an order has been made by a judge at Chambers to stay proceedings in an action of libel, on certain terms of settlement agreed to by the solicitors on both sides; unless the terms of settlement are agreed to by the parties themselves, the order may be set aside, on the application of a party who never agreed to the terms (u).

Staying frivolous action.

Where an action is utterly hopeless, frivolous, and vexatious, the court will stay the proceedings; but it must be clearly shown by affidavit, uncontradicted, that the action has no legal foundation (x).

Consolidation of Several Actions for same libel.

And although a defendant is liable in damages for every distinct publication of a libel; and the party libelled has a right to bring a separate action for each and every publication; still the court is empowered to interfere to prevent harassing and vexatious proceedings: as in a case where the plaintiff brought seven actions against one defendant for seven different publications of the same libel; a rule was made absolute for staying proceedings in all but one, until that one should be tried (y). And by a recent statute (z), it is now competent for a judge, or the court, upon application by two or more defendants in actions in respect to the same, or substantially the same libel, brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together (a). And the jury are to assess the damages

(r) *Macdougall v. Knight* (No. 2), 25 Q. B. D. 1; 59 L. J. 517.

(s) *The Queen v. Bayley, In re Mason v. Aird*, 8 Q. B. D. 411; 51 L. J. 244.

(t) *Ponting v. Watson*, 1 Jur. N. S. 1139.

(u) *Webster v. Acton*, 11 W. R. 114.

(x) *Dawkins v. Prince Edward of*

Saxe-Weimar, Same v. Wynyard, Same v. Stephenson, 1 Q. B. D. 499; 45 L. J. 567.

(y) *Jones v. Pritchard*, 6 D. & L. 529; 18 L. J. Q. B. 104; 13 Jur. 427.

(z) 51 & 52 Vict. c. 64, s. 5.

(a) *Vide Stone v. Press Association, Ltd., supra*, p. 256.

(if any) in one sum; but a separate verdict must be taken for or against each defendant, and the damages apportioned by the jury. And the judge at the trial, if he awards to the plaintiff the costs of the action, may apportion the costs between and against such defendants. CHAP. XXII.

Where, on an action for a newspaper libel coming on for trial at the assizes, the defendants offered, by way of settlement, to publish an apology in their newspaper and pay a sum of money as costs, on a juror being withdrawn: which terms were agreed to by the plaintiff: the same evening the defendants published the apology; but in the same newspaper inserted an article which nullified it, and was in fact an aggravation of the original libel. Upon these facts being brought to the notice of the judge at the same assizes, he decided to proceed with the trial of the action forthwith, when a verdict and judgment were obtained for the plaintiff. On motion afterwards to a Divisional Court, to set aside the verdict and judgment so obtained, it was held, that the withdrawal of a juror under the circumstances stated did not constitute a termination of the action so as to oust the jurisdiction of the judge to proceed with the trial; and that the learned judge had rightly exercised his jurisdiction; and the verdict and judgment were upheld (b). Withdrawal of Juror : Apology : breach of faith.

Bills of exceptions, and proceedings in error, are abolished by the Orders and Rules of Procedure under the Judicature Act, 1875. Under the former practice, a bill of exceptions might be tendered to the ruling of the judge at Nisi Prius, upon the trial of an action-at-law for libel or slander, if the judge insisted on nonsuiting the plaintiff against his will, or that of his counsel (c): so also, upon any misruling or misdirection of the judge on any point of law. One of the latest instances of a bill of exceptions being tendered to the ruling of a judge at Nisi Prius in an action of libel, was in the case of *Dawkins v. Lord Rokeby* (d). Bills of Exceptions abolished.

The court will not grant a rule for striking an attorney off the rolls on the mere ground that he has published a libel of an aggravated nature, and that a jury have given a verdict against him with 1s. damages (e). Publication of a Libel no ground for striking Attorney off rolls.

A contract to indemnify another against the consequences Contracts of indemnity, against publication of libels.

(b) *Thomas v. The Exeter Flying Post Co.*, 18 Q. B. D. 822; 56 L. J. 313. 21 L. J. Q. B. 18. (d) *Supra*, p. 133.

(c) *See parte* —, 2 Dowl. 110; see (e) 4 Bing. N. C. 83; 6 Dowl. 238; *Re Hawdone*, 9 Dowl. 970.

CHAP. XXII. of publishing a libel ; or a promise to pay, or reward another if he will publish a libel of a third party, is void. And so, where the plaintiff, at the request of the defendant, published a libel against a third party, in a newspaper of which the plaintiff was the proprietor ; and the party libelled having brought an action of libel against the plaintiff, the defendant, in consideration that the plaintiff would defend the action, promised to indemnify him against all costs, damages, and expenses, it was held, that both the promise and the consideration were illegal. And after verdict for the plaintiff, judgment was arrested : and it was further held, that even if the illegality could be got rid of, the contract would still be void on the ground of maintenance (*f*).

When funds of a Corporation may be applied in defence of action.

An association incorporated by Royal Charter were the proprietors and publishers of a newspaper, and employed one of its members as honorary editor. An action of libel having been brought against the editor alone in respect of an article published in the paper under the express instructions of the association ; it was held, that the funds of the association might be lawfully applied in undertaking the defence of the action (*g*).

Maintenance in an action of libel.

The plaintiffs published an article in a newspaper containing libellous imputations upon T. and H. In so far as the article reflected upon T. he brought an action of libel against the plaintiffs ; H. maintaining him in his action. No issue was raised in the action as to the reflections upon H.'s character. The action having resulted in a verdict for the (now) plaintiffs, T. was unable to pay their costs. An action was then brought by the plaintiffs against H. for maintaining T. in his action ; and it was held that the action would lie at the suit of the plaintiffs for the amount of the taxed costs of their defence to T.'s action (*h*).

Proprietor of Newspaper no remedy against Editor for amount of fines for libel.

The proprietor of a newspaper, convicted and fined for the publication of a libel inserted in his newspaper without his knowledge and consent, by the editor, cannot recover against the editor, either on the ground of breach of contract or otherwise, the damage sustained by such conviction : for a person who is declared by the law to be guilty of a crime cannot be

(*f*) *Shackell v. Rosier*, 2 Bing. N. C. 634, 649 ; 3 Scott, 59. And see an American case to similar purport, *Atkins v. Johnson*, 43 Vt. 78 ; 5 Am. R. 260.

(*g*) *Breay v. Royal Brit. Nurses' Association*, C. A. (1897), 2 Ch. 272.

(*h*) *Alabaster and others v. Harness and others*, 64 L. J. Q. B. 76.

allowed to recover damages against another who has participated in its commission (i). And a promise or agreement made, in consideration that a party will forbear to publish defamatory matter of another is illegal, and cannot be enforced (k). CHAP. XXII.

Neither the author nor the publisher of a libellous or immoral work have any protection afforded them under the laws of copyright; and they cannot maintain an action against any person for publishing a pirated edition of such a work (l). No Copyright in immoral or libellous Work,

Nor can the printer of such a work maintain an action for work and labour done, &c., against the publisher or other person who employed him (m). nor right to sue for printing such.

And an action cannot be maintained to recover the value of obscene or libellous prints sold by the plaintiff to the defendant (n).

A printer may refuse to print libellous matter; and if in the course of printing he discover the work to be libellous, he may refuse to complete it, but may nevertheless recover for the work and labour done, and materials supplied for such parts of it as are not libellous. But if a printer agree at terms stated, to print a treatise and a dedication, knowing the latter to be libellous, and after printing the treatise refuse to print the libellous dedication he cannot recover the amount for printing the treatise. But if a *bonâ fide* contract be entered into by a printer to print a work consisting of two parts, and at the time of entering into the contract, the printer has no means of knowing that one part is unlawful, and he prints both, and afterwards, on discovery that one part is unlawful, suppresses it, there is still an implied undertaking on the part of the person employing him, to pay for that part of the work which is lawful (o). Printer cannot recover for printing libellous matter.

Proceedings after Verdict. A motion for a new trial, or to set aside a verdict, finding, or judgment, must be made where there has been a trial without a jury, by appeal to the Court of Appeal. And every motion for a new trial or to set aside a verdict, finding, or judgment, where there has been a trial Motion for new trial, or to set aside verdict.

(i) *Colburn v. Patmore*, 1 C. M. & R. 73.

(m) *Poplett v. Stockdale*, R. & M. 337.

(k) *Brown v. Brine*, 1 Ex. D. 5; 45 L. J. 129.

(n) *Fores v. Johnes*, 4 Esp. 97.

(l) *Stockdale v. Onwhyn*, 5 B. & C. 173.

(o) *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237.

CHAP. XXII. thereof, or of any issue therein with a jury, must be entered in the Court of Appeal (p).

Grounds of application for.

A new trial will not be granted on the ground of misdirection, or of the improper admission, or rejection of evidence; or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them; unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial; and, if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties (q).

A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding, or decision, upon any other question (r).

What is a "substantial wrong or miscarriage."

Where there has been a misdirection to the jury, in favour of the plaintiff, upon a material part of the libel, and the jury have given a verdict for the plaintiff with large damages; although the court may afterwards think that the nature of the libel was such that the jury would probably have given the same verdict, even if there had been no misdirection; yet, there having been a "substantial wrong or miscarriage" within the meaning of the rule (above stated), the defendant is entitled to a new trial (s).

Misdirection as to privilege, and burthen of proof in libel.

Where the respondent (plaintiff) was a government medical officer at Portland in Jamaica, and the appellant (defendant) was a pen-keeper residing in the same parish and a justice of the peace; the defendant wrote and sent a letter to the inspector of constabulary in the same district, imputing to the plaintiff serious neglect of duty in his capacity of medical officer, and asking the inspector to inquire into the matter and report thereon to the proper authority: in an action of libel the defendant pleaded that the statements contained in the letter were true and the occasion privileged: at the trial the jury were directed that the existence of privilege was contingent

(p) See R. S. C., Ord. XXXIX., rr. 1 and 1A.

(q) See R. S. C., Ord. XXXIX., r. 6.

(r) *Ibid.* r. 7.

(s) *Bray v. Ford*, (1896) App. Cas. 44; 65 L. J. Q. B. 213; and see *Dakyl v. Labouchere*, (1907) 23 T. L. R. (H. L.) 364.

upon whether in their opinion the defendant honestly believed the communication he made to the inspector to be true: that where a defamatory communication of the kind is made in the discharge of duty, it was incumbent on the defendant to satisfy the jury that he made the communication with a belief in its truth, before the question of privilege arises for the determination of the judge. The jury having upon this direction found a verdict for the plaintiff with damages: on appeal it was held that the verdict was founded upon a misdirection: that the jury should have been directed that the occasion was *primâ facie* privileged in the absence of express malice; and that the burden of proof of the latter was upon the plaintiff (*t*).

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The court will not grant a new trial on the ground of misdirection by the judge, in not stating his opinion to the jury as to whether the matter complained of was libellous or not (*u*). Nor on the ground that documents have been improperly held protected from production; if it be shown that they were irrelevant to the issues, or not admissible in evidence (*x*). Nor on the ground merely that the judge at Nisi Prius had prejudged the case, by suggesting, in the presence and hearing of the jury, that it would be better to withdraw a juror (*y*).

Where the innuendo is wide, and the jury find that the alleged libel will not bear the construction put upon it by such innuendo and give a verdict for the defendant; notwithstanding that special damage is laid and proved, the court will not grant a new trial (*z*).

In a case in which a plea of justification contained three material allegations: during the summing up of the judge, the jury expressed themselves satisfied as to one of the facts in favour of the plaintiff. The judge told the jury that in order to find for the defendant on that issue, they must be satisfied that all three allegations were substantially proved: the jury having afterwards found a verdict for the defendant, the court refused to alter or set it aside (*a*).

Premature
Opinion of
Jury.

The court will rarely interfere to set aside the verdict of a jury in an action of slander or libel, or to grant a new trial, on

That Verdict
against weight
of evidence.

(*t*) *Jenoure (App.) v. Delmege* (*x*) *Beatson v. Skene*, 29 L. J. Ex.

(*Resp.*), (1891) App. Cas. 73; 60 L. J. 430.
P. C. C. 11.

(*y*) *Lloyd v. Jones*, 7 B. & S. 475.

(*u*) *Hearne v. Stowell*, 11 L. J. Q. B.

(*z*) *Broome v. Gosden*, 1 C. B. 728.

(N. S.) 25; 12 A. & E. 719; 4 P. & D. 696.

(*a*) *Napier v. Daniel and another*,
3 Bing. N. C. 77; 3 Scott, 417.

CHAP. XXII. the ground merely that the verdict was against the weight of evidence: it is only on very strong grounds that the court will do so (*b*). And where the damages are under £20, a new trial ought not to be granted on the ground that the verdict was against the weight of evidence (*c*).

Where the plaintiffs and defendant were rival newspaper proprietors: the defendant published an article referring to the plaintiffs' newspaper as the "Evening Ananias": in an action of libel, the jury having found a verdict for the defendant, the Supreme Court of New South Wales set it aside and ordered a new trial, on the ground that the verdict was against the weight of evidence: but on appeal to the Judicial Committee of the Privy Council, it was held, that, it being for the jury to determine in what sense the words were used, having regard to the context and circumstances of the case, their verdict should not have been set aside (*d*).

That Damages excessive.

Where the damages are so outrageously heavy as to induce a strong presumption of partiality in the jury, a new trial will be granted (*e*). But where the action was by a beneficed clergyman, for a slander imputing to him acts of immorality and misappropriation of the Sacrament money, the jury having found a verdict for the plaintiff, with damages £750, an application for a new trial, on the ground that the damages were excessive, was refused; and the court said that, looking at the destructive and serious nature of the imputations, the damages were anything but excessive (*f*). The court will not grant a new trial on the ground of excessive damages unless clearly of opinion that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them (*g*).

Power of Court as to reduction of damages.

Where the plaintiff, in an action of libel, is entitled to substantial damages, and the verdict of the jury cannot be impeached except on the ground that the damages are excessive; it was held that the court had power, with the consent of the plaintiff alone, to reduce the damages to such an amount as, in the opinion of the court, would not be excessive had

(*b*) *Odger v. Mortimer*, 28 L. T. N. S. 472.

(*c*) See *Booth v. Briscoe*, 2 Q. B. D. 497.

(*d*) *Australian Newspaper Co., Ltd. (App.) and Bennett (Resp.)*, (1894) App. Cas. 284; 63 L. J. P. C. C. 105.

(*e*) *Smith v. Brampston*, 2 Salk. 644.

(*f*) *Highmore v. The Earl and Countess of Harrington*, 3 C. B. (N. S.) 142; and see *Adams v. Coleridge*, 1 T. L. R. 84: where the jury awarded £3,000 on the ground of the vindictive nature of the publication.

(*g*) *Praed v. Graham*, 24 Q. B. D. 53; 59 L. J. 230.

they been given by the jury (*h*). That case has, however, CHAP. XXII. been overruled, and it has been held by the House of Lords that where the jury found a verdict for the plaintiff with damages which the Court of Appeal considered unreasonable and excessive, that Court (*i.e.*, the Court of Appeal) had no jurisdiction, without the defendant's consent, to order that unless the plaintiff consented to reduce the damages there should be a new trial (*i*).

Where in an action of libel and slander arising out of a candidature at a parliamentary election, the jury awarded the plaintiff £5,000 damages: on motion for a new trial on the ground (amongst others) that the damages were excessive; the Court of Appeal, being of opinion that the jury had awarded punitive damages, made it a condition of their refusal to grant a new trial, that the plaintiff should consent to a reduction of the damages to £2,500 (*k*).

There is no inexorable rule of practice precluding the granting of a new trial in actions of slander and libel, on account of the inadequacy of the damages: and therefore, where the damages are so small as to show that the jury have made a compromise, and instead of deciding the issues submitted to them, have agreed to find for the plaintiff for nominal damages only, a new trial will be granted; such a case being in effect as if the jury had been discharged without a verdict (*l*). But the court will seldom interfere on the ground of inadequacy of damages, unless there has been some mistake in the calculation of figures by the jury, or in a point of law by the judge who presided; and this, notwithstanding that malice has been proved (*m*). And it is no ground for setting aside a verdict in an action of slander, that the jury have given only *one shilling* damages, under a mistaken notion that it would carry costs (*n*). But where the jury before whom an action of libel was tried, inquired whether a

On ground of inadequacy of damages: principles on which granted.

(*h*) *Belt v. Lawes*, 12 Q. B. D. 356; 53 L. J. 249.

(*i*) *Watt v. Watt*, A. C. (1905) 115.

(*k*) *Gatty v. Farquharson*, 9 T. L. R. 593. In an action for a libel published in a newspaper, the Court of Queen's Bench in Ireland, being of opinion that there was no reasonable proportion between the damages and the circumstances of the case, set aside the verdict, on the ground that the damages were excessive: *Harris*

v. Arnott and others, (1890) L. R. (Ir.) 26 Q. B. D. 55, affirmed on appeal, *Ibid*.

(*l*) *Falrey v. Stanford*, L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; and see the observations of Blackburn, J., in *Kelly v. Sherlock*, L. R. 1 Q. B. 697.

(*m*) *Rendall v. Hayward*, 5 Bing. N. C. 424; 7 Sc. 487.

(*n*) *Mears v. Griffin*, 1 M. & Gr. 796; 2 Sc. (N. R.) 15; and see *Kilmore v. Abdoolah*, 27 L. J. Ex. 307.

CHAP. XXII. shilling would carry costs, and being answered in the affirmative, found a verdict for the defendant; the court granted a new trial; it being clear that they decided against their conscience, and that if a shilling would not have carried costs they would have found a verdict to that extent at least for the plaintiff (o). Where the plaintiff, a clergyman of the Church of England, sued for libels published in the defendant's newspaper: no justification was pleaded, but the defendant gave notice, under the Libel Act, 1843 (p), of his intention to give in evidence, in mitigation of damages, an apology he had offered to the plaintiff. At the trial it was shown that after the publication of articles offensive to the plaintiff, but previous to the publication of the more serious libels, the plaintiff in a letter addressed to the editor of another newspaper, had spoken of the defendant's newspaper as "the dregs of journalism;" and in a sermon preached and circulated by him before action brought, charged some of his opponents with subornation of perjury. The jury found a verdict for the plaintiff, with one farthing damages. On application for a new trial, on the ground that the damages were inadequate; it was held, that although there can be no set-off of one libel against another, yet in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider his conduct, and the degree of respect which he himself had shown for the feelings of others: that it was the province of the jury to weigh both matters of aggravation and mitigation, and to decide on the damages; and, therefore, a new trial was refused (q). So in an action of slander, a new trial was applied for on the ground that the damages were very inadequate; but as it did not appear that there had been any misconduct or mistake on the part of the jury, or that a new trial was necessary in order to vindicate the plaintiff's character, it was refused (r).

Motion for Judgment.

Although very general powers are given by the R. S. C. (s), as to motions for judgment on leave reserved at the trial; still it was not intended by those rules that the court should take advantage of them by taking upon itself any function which properly belongs to a jury, such as determining facts which depend on the credibility of witnesses; and even when the facts are admitted and the question turns on the

(o) *Leri v. Milne*, 4 Bing. 195; 12 Moore, 418.

(p) 6 & 7 Vict. c. 96.

(q) *Kelly v. Sherlock*, 35 L. J. Q. B.

209; L. R. 1 Q. B. 686.

(r) *Forsdike and wife v. Stone*, L. R.

3 C. P. 607; 37 L. J. C. P. 301.

(s) See Ord. XL.

proper inferences to be drawn from them, unless power is expressly given to the court to draw inferences, the question is still one for the jury (*t*). And accordingly where, in an action for a libel, alleged to be contained in the report of a trial, the jury found a verdict for the plaintiff with damages; the learned judge then left both parties to move for judgment: when, it appearing that there was evidence which ought to have been submitted to the jury as to the fairness of the report, but which had not been so submitted, the court refused to enter judgment for either party, and directed a new trial (*u*).

Where the defence pleaded is bad in law, and the replication contains no averment that the defence so pleaded is bad, or that it is insufficient in law, but merely joins issue on the defence; then, if the jury, upon that issue, find a verdict for the defendant, the plaintiff's only course is to move for judgment, notwithstanding the finding of the jury (*x*).

Where in an action of libel, founded upon a statement contained in a circular issued by the defendants, the judge at the trial ruled that the occasion of the publication was privileged; but the jury, in response to certain questions left to them, found that the matter complained of in the circular was a libel upon the plaintiff, and was untrue, and in excess of the privilege; and they assessed the damages at £100; but they were unable to agree upon the question of malice, the learned judge having, upon these findings, entered judgment for the plaintiff: it was held, by the Court of Appeal, that the occasion being privileged and there being no evidence of malice, nor any finding by the jury of malice, the verdict and judgment must be set aside and judgment entered for the defendants (*y*). And on appeal to the House of Lords the judgment of the Court of Appeal was affirmed: and it was held that, in the opinion of their Lordships, there was nothing defamatory of the plaintiff contained in the circular, and that the learned judge at the trial should have directed judgment of nonsuit to be entered, without submitting the case to the jury (*z*).

But although the court is of opinion that the occasion of publishing the defamatory matter was privileged, and also that there was no evidence of malice fit for a jury; if there has

(*t*) See per Mellish, L.J., *Milissich v. Lloyd*, 46 L. J. Q. B. D. 406.

(*u*) *Ibid.*

(*x*) *Macdougall v. Knight*, 14 App. Cas. 198, per Lord Halsbury, C., and

Ibid., p. 203, per Lord Bramwell.

(*y*) *Nerill v. Fine Arts & General Insurance Co., Ltd.*, (1895) 2 Q. B.

156; 64 L. J. 681.

(*z*) *Ibid.*, (1897) App. Cas. p. 68.

CHAP. XXII. been misdirection to the jury, the court will not in their discretion, under Ord. XL., enter a verdict for the defendant, but will direct a new trial (*a*).

Defendant
entitled to
judgment
though Jury
discharged
without
verdict.

Where, in an action of libel, the jury being unable to agree on a verdict, were discharged; and before the case could be set down again for trial, the defendants applied to a Divisional Court for leave to enter judgment for them (*b*), upon the ground that the court had before it all the materials necessary for finally determining the matters in dispute without the verdict of a jury; contending that if the jury had found in favour of the plaintiffs every circumstance relating to the publication which the evidence could prove,—and even though the jury had found, that in their opinion, the publication was a libel,—yet the court ought to come to a contrary conclusion and give judgment for the defendants notwithstanding such verdict, after considerable argument the court,—being of opinion that the plaintiffs had failed to show that the publication was libellous—held that there was no case to submit to the jury, and that the defendants were therefore entitled to judgment (*c*).

Grounds for
setting aside
Judgment.

In general, where defamatory words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict (*d*); provided they are fairly susceptible of that meaning. And where the words complained of are clearly libellous, though expressed in general terms; and the libellous matter is pointed by innuendo as applying to the plaintiff; and the jury so find, the judgment cannot be set aside (*e*). So also if the libel, in its ordinary interpretation, be understood as derogatory to the character of the plaintiff, and the jury so find (*f*). But it is not enough to entitle a plaintiff to judgment that he should have charged the defendant with malicious motives, and the libel as having a calumnious tendency, and that the jury should have found a verdict for the plaintiff; for if the court should afterwards be of opinion that the matter charged is not libellous, or is otherwise not actionable, judgment will be arrested; whether on an indictment or information in a criminal proceeding, or on a record in a civil suit (*g*).

(*a*) *Clark v. Molyneux*, 3 Q. B. D. 215; 47 L. J. 237.

(*b*) See R. S. C., Ord. XL., r. 10.

(*c*) *The Capital & Counties Bank v. Henty and others*, 7 App. Cas. 741; 52 L. J. Q. B. 232 (Lord Penzance dissentiente).

(*d*) 8 Mod. 240.

(*e*) *Wakley v. Healey*, 7 C. B. 591, 605; 18 L. J. C. P. 241.

(*f*) *Ibid.*, and see *Hughes v. Rees*, 4 M. & W. 204.

(*g*) *Hearne v. Stowell*, 12 A. & E. 731; *Goldstein v. Foss*, 6 B. & C. 154;

Where at the trial of an action of libel in the Supreme Court of the colony of St. Helena, the libel was not produced, and the judge took upon himself the functions of the jury, and the proceedings were otherwise irregular, and a verdict was found for the plaintiff, with substantial damages; the Judicial Committee of the Privy Council granted special leave to appeal, notwithstanding that the Chief Justice of the island, who tried the case, had expressed his approval of the verdict, and refused leave to appeal: and, after hearing the arguments, the judgment of the Supreme Court was arrested (*h*).

CHAP. XXII.

Libel not produced.
Proceedings irregular.

CHAPTER XXIII.

INFERIOR COURTS, JURISDICTION AND PROCEEDINGS IN ACTIONS OF SLANDER AND LIBEL.

Jurisdiction of County Courts in libel and slander, when?
Procedure in County Court on action remitted from High Court.
Costs, where action remitted to County Court.

Jurisdiction of Liverpool Court of Passage.
Costs of Libel action in Mayor's Court.
Jurisdiction of Court of University of Oxford.

By the County Courts Act, 1888 (*a*), the court has no cognizance of any action of libel or slander. But if both parties agree, by a memorandum signed by them or their respective solicitors, that the judge of any court named in such memorandum, shall have power to try such action, such judge shall have jurisdiction to try the same (*b*).

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Jurisdiction of County Courts in Libel and Slander, when?

And as to an action of libel or slander remitted from the High Court to be tried in a County Court, the action must be tried and taken in such court, as if it had originally been commenced therein (*c*).

It has been held that the High Court of Justice had jurisdiction under the corresponding section of the County Court Act (now repealed), to remit an action of slander to a County

2 Y. & J. 146; *Nevill v. Fine Arts & General Insurance Co., Ltd.*, (1895)
2 Q. B. 156; App. Cas., (1897) p. 68.
(*h*) *Stace v. Griffith*, 6 Moo. P. C. C.
(N. S.) 18; L. R. 2 P. C. A. C. 420.

(*a*) 51 & 52 Vict. c. 43, s. 56.
(*b*) *Ibid.*, s. 64, and *vide* County Court Rules, 1903, Ord. V., r. 2.
(*c*) 51 & 52 Vict. c. 43, s. 66.

CHAP. XXIII. Court; and that in view of section 67 of the Judicature Act, 1873, an action of slander is one in which "relief is sought which can be given in a County Court" (*d*).

Procedure in
County Court
on action
remitted from
High Court of
Justice.

Where, by order of the High Court of Justice, any action is remitted or transferred to a County Court, the plaintiff must lodge with the registrar the order or a duplicate thereof, and the writ, together with the pleadings, affidavits, and other documents filed in the High Court, or copies thereof, and also a statement of the names and addresses of the several parties to the action, and their solicitors, if any; and (if no statement of claim has been delivered in the High Court) a concise statement of the particulars of claim such as would be required upon entering a plaint; and the registrar must thereupon enter the action for trial and give notice to the parties of the day appointed for such trial, by post or otherwise, at least ten clear days before such day; and must annex to the notice to the defendant a copy of the particulars (*e*).

Order to be
filed.

The registrar must forthwith indorse on the order, or duplicate thereof, the date on which the same was lodged, and file the same; and the action must proceed in all things as if it were an ordinary action in the court. No notice of defence under Order x. shall be required where a statement of defence has been delivered in the High Court (*f*).

Defendant
shall proceed
as if action
originally
brought in
County Court.

Upon being served with a notice of trial under Rule 1 of this Order, a defendant must proceed in all things in the same way as if the action had been brought in the County Court, and the notice so served upon him was an ordinary summons (*g*).

Special notice
of apology in
action of libel
or slander.

Where in any action for libel or slander remitted under section 66 of the Act, to be tried in a County Court, the defendant intends to avail himself of the provisions of sections 1 and 2 of the Libel Act, 1843, he must give notice in writing of such intention to the registrar, five clear days at least before the day appointed for the trial of the action (*h*).

Payment into
Court in
remitted
action of libel.

Where a defendant in an action of libel remitted under section 66 of the Act, pays money into court under section 2 of the Libel Act, 1843, the rules of this Order apply to and must be observed with reference to such payment into court, so far as they are applicable (*i*).

(*d*) *Stokes v. Stokes*, 19 Q. B. D. 62;
(on App.) 419; 56 L. J. 494.

(*e*) C. C. R., 1903, Ord. XXXIII.,
r. 1.

(*f*) *Ibid.*, r. 2.

(*g*) *Ibid.*, r. 3.

(*h*) *Ibid.*, r. 4 (see Forms of Notice
in Appendix, *infra*).

(*i*) C. C. R., 1903, Ord. IX., r. 14.

Payment into court with a denial of liability is not permitted in any action or counter-claim for libel or slander (*k*). CHAP. XXIII.

Where in any action for libel or slander the defendant relies, as a defence, on the fact that the libel or slander is true, he must in his statement set forth that the libel or slander complained of is true in substance (*l*). Defence that libel or slander is true.

Where in any action of libel or slander, the defendant does not rely as a defence, on the fact that the libel or slander is true, but relies in mitigation of damages, on the circumstances under which the libel or slander was published, or on the character of the plaintiff, he must, in his statement, give particulars of the matters relating thereto as to which he intends to give evidence (*m*). Facts in mitigation of damages in libel or slander.

When the defendant relies on any statutory defence or on any defence of which he is required by the Act or any statute to give notice, he must, in his statement (except in the case of any statute of limitations), set forth the year, chapter, and section of the statute, and the short title thereof, and the particular matter on which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies (*n*). Statutory Defence.

Where an action has been remitted by a judge of the High Court, for trial in a County Court, the costs of the parties in respect of the proceedings subsequent to the order of the judge of the High Court, must be allowed according to the scale of costs for the time being in use in the County Courts; and the costs of the order and all proceedings previously thereto, must be allowed according to the scale of costs for the time being in use in the Supreme Court (*o*). Costs, where action remitted to County Court.

It has been held, that after an action has been remitted to a County Court, the Superior Court in which the action was commenced, has no jurisdiction over the costs; and cannot make an order to tax. But it appears that the judge of the County Court has such jurisdiction (*p*).

By the Judicature Act, 1873 (*q*), it is enacted, that the several rules of law enacted and declared by that Act, shall be in force and receive effect in all courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such courts. Judicature Act and Rules apply to Inferior Courts.

(*k*) C. C. R., 1903, Ord. IX., r. 12.

(*o*) 51 & 52 Vict. c. 43, s. 66.

(*l*) *Ibid.*, Ord. X., r. 16 (see Form of Defence in Appendix, *infra*).

(*p*) *Moody v. Steward*, L. R. 6 Ex. 35; 40 L. J. Ex. 25.

(*m*) *Ibid.*, r. 17.

(*q*) 36 & 37 Vict. c. 66, s. 91.

(*n*) *Ibid.*, r. 18.

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Liverpool
Court of
Passage.

It has been held, that under this enactment, the Rules and Orders under the Judicature Act, apply to the Liverpool Court of Passage, and therefore, following the decision of *Garnett v. Bradley* (r), a plaintiff in an action of slander in that court, who had obtained a verdict with one shilling damages, was held entitled to his costs under the R. S. C. (s), where the judge before whom the action was tried had not otherwise ordered (t). Under the Liverpool Court of Passage Act (u), in actions of tort remitted from the High Court for trial in the Liverpool Court of Passage, the procedure is assimilated to that of cases of the kind remitted for trial in a County Court.

Costs of action
of libel tried in
Mayor's Court.

In an action of libel tried in the Mayor's Court, London, where the jury found for the plaintiff, with 50s. damages; it was held, that that court had jurisdiction to order costs to be paid to the plaintiff, although there was no scale provided by the rules for costs in such a case (x).

Court of
University of
Oxford :
Jurisdiction in
Libel.

Where an action was brought against the defendant for a libel published in several London newspapers; it appeared that the plaintiff was the proprietor of a travelling circus, and in no way connected with the University of Oxford, nor resident within its limits; but the defendant was an undergraduate member of Worcester College, and resided within the University. The Chancellor of the University of Oxford claimed consuance of the action in the Court of University, based upon a charter of Hen. VIII., confirmed by statute of Eliz.: and it was held, that the claim of the Chancellor must be allowed, notwithstanding the plaintiff's non-residence within the limits of the University (y).

(r) *Supra*, p. 320.

(s) R. S. C., Ord. LXV., r. 1.

(t) *King v. Hawkenworth*, 4 Q. B. D. 371; 48 L. J. 484.

(u) 56 & 57 Vict. c. 37, s. 4.

(x) *Hall v. Launsbach*, C. A., (1893) 1 Q. B. 513.

(y) *Ginnett v. Whittingham*, 55 L. J. 409; 17 Q. B. D. 761.

CRIMINAL DIVISION.

THE nature and extent of the civil remedy in respect of defamatory publications having been considered in the preceding chapters, the subject is next to be regarded with reference to the offence against the public; and the remedy by indictment and criminal information.

CHAPTER XXIV.

BLASPHEMOUS PUBLICATIONS.

Blasphemy, an offence against the peace and good order of society.

An indictable offence at common law.

Cases on the subject.

Matter and manner of the publication.

Distinction between general ridicule of

the Scriptures and discussions on controversial points.

Intention, the criterion and test of guilt.

Defendant on his trial, not allowed to re-assert, nor to justify the blasphemy.

BLASPHEMIES against God and religion may be regarded CHAP. XXIV.
spiritually, as acts of imbecile and impious hostility against
the Almighty, or temporally, as they affect the peace and good Blasphemy
an offence
against the
peace and good
order of society.
order of civil society. It is in the latter relation only that
such offences are properly cognisable by municipal laws. To
attempt to redress or avenge insults to a supreme and omni-
potent Creator, would be absurd; but when it is considered
that such impieties not only tend to weaken and undermine
the very foundation on which all human laws must rest, and
to dissolve those moral and religious obligations, without the
aid of which mere positive laws and penal restraints would be
inefficacious, but also immediately tend to acts of outrage and
violence (a), being, for the most part, gross insults to those
who believe in the doctrines which are held up to scorn and

(a) See the remarks of the learned Michaelis, on the question whether blasphemy ought to be punished in

the temporal courts.—*Michaelis on the Mosaic Law*, vol. iv. p. 491; Smith's Translation.

CHAP. XXIV. contempt, they necessarily become an important subject of municipal coercion and restraint (*b*). Offences of this nature are punishable in the temporal courts with fine and imprisonment, because they tend to subvert all religion and morality, which are the foundation of Government (*c*).

The importance of such restraints is strongly illustrated in the instance of *judicial oaths*. To remove, therefore, so solemn and weighty an obligation, would be to overthrow, or at least to weaken, that confidence in human veracity which is necessary for the purposes of society, without which no question of property could be decided, and no criminal brought to justice (*d*).

Blasphemy
an indictable
Offence at
Common Law.

Blasphemy against the Almighty, by denying his Being or providence, contumelious reflections upon the life and character of Jesus Christ (*e*), and in general, scoffing, flippant, and indecorous remarks and comments upon the Scriptures, are offences at Common Law; for Christianity, as has frequently been asserted by high authorities (*f*), is part of that law.

Cases on the
subject.

In the case of *Rex v. Taylor* (*g*), the defendant was convicted upon an information for saying that "Jesus Christ was a bastard and whoremaster; religion was a cheat; and that he neither feared God, the Devil, nor man." Hale, C.B., observed that such kind of wicked and blasphemous words were not only an offence against God and religion, but a crime against the laws, state, and government, and therefore punishable in this (*i.e.* King's Bench) court: that to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved; and Christianity being parcel of the laws of England, therefore, to reproach the Christian religion

(*b*) "The first grand offence of speech and writing is, speaking blasphemously against God, or reproachfully concerning religion, with an intent to subvert man's faith in God, or to impair his reverence of Him." Holt, L. L. 64 (2nd edition).

(*c*) Haw. P. C., b. 1, c. 5.

(*d*) *Utiles esse opiniones has quis negat cum intelligat quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocârit; quamque sancta sit societas civium inter ipsos Diis immortalibus interpositis tam judicibus tam testibus.* Cic. de LL.

(*e*) Haw. P. C., Book 1, c. 5; 1

Vent. 295; 3 Keb. 607; 4 Blac. Com. 59.

(*f*) 4 Blac. Com. 59; 1 Haw. Pl. Cr. c. 5; Vent. 293; 2 Str. 834; 11 Mod. 142; 1 Str. 416, 788; Fitzg. 65; 2 Roll. Ab. 78; Cro. J. 24, 421. And where an injunction was applied for to restrain the publication of Lord Byron's "Cain," Lord Eldon, C., said—"This court, like other courts of justice in this country, acknowledges Christianity as part of the law of the land." *Murray v. Benbow*, in Ch. 1822, MSS.

(*g*) Vent. 293; 3 Keb. Rep. 607, pl. 53, 621, pl. 94; Trem. Entr. 227; 2 Str. 789.

is to speak in subversion of the law (*h*). In the case of *Rex v. Woolston* (*i*), the defendant had been convicted of publishing five libels, wherein the miracles of Jesus Christ were turned into ridicule, and his life and conversation aspersed and vilified. It was moved in arrest of judgment, that the offence was not punishable in the temporal courts; but the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence of temporal cognizance. It was contended on the part of the defendant, that the intent of the book was merely to show that the miracles of Jesus Christ were not to be taken in a literal but in an allegorical sense; and therefore that the book could not be considered as aimed at Christianity in general, but merely as attacking one proof of the divine mission. But the court was of opinion, that the attacking Christianity in that way was attempting to destroy the very foundation of it; and though there were professions in the book to the effect that the design of it was to establish Christianity upon a true foundation, by considering those narratives in Scripture as emblematical and prophetical, yet that such professions could not be credited; and that the rule was *allegatio contra factum non est admittenda*. And the court, in declaring that they would not suffer it to be debated whether writing against Christianity in general was a temporal offence, desired that it might be noticed that they laid their stress upon the term *general*, and did not intend to include disputes between learned men upon particular controverted points; and Lord Raymond, C.J., in delivering the opinion of the court said, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interfere only where the very root of Christianity is struck at"; and with him agreed the whole court (*k*). In the case of *The King v. Thomas Ashley* (*l*), the defendant was con-

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(*h*) The meaning of the expression here used by Lord Hale, that "Christianity is parcel of the laws of England," though often cited in subsequent cases, appears to have been much misunderstood. The expression can only mean either, that as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law; or that the laws of England, like all municipal laws of a Christian country, must upon principles of general jurisprudence, be subservient to the positive

rules of Christianity. In this sense Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. *Vide* 6th Rep. Comrs. on Cr. Law, p. 83.

(*i*) Str. 834; Fitzg. 604; Barnard. 162, 266; and *vide* "Digest, Law of Libels," by "a Gentleman of the Inner Temple" (1765), pp. 59 and 124.

(*k*) Fitzgibbon, 66.

(*l*) Trin. T. 19 Geo. II. (1746); Digest, Law of Libels, 125.

CHAP. XXIV. victed of blasphemy in printing and publishing several libels, intituled, "Discourses on the Miracles of our Saviour, in view of the present controversy between Infidels and Apostates."

Criminal Informations may be filed against publishers of profane and blasphemous libels.

In the case of *Jacob Ilive*, an information (m) was filed against him by the Attorney-General for publishing a profane and blasphemous libel, tending to vilify and subvert the Christian religion, and to blaspheme our Saviour Jesus Christ, to cause his Divinity to be denied, to represent him as an impostor; to scandalise, ridicule, and bring into contempt his most holy life and doctrine; and to cause the truth of the Christian religion to be disbelieved and totally rejected, by representing the same as spurious and chimerical, and a piece of forgery and priestcraft. In the case of *Peter Annett*, an information (n) was exhibited against him by the Attorney-General, for a certain malignant, profane, and blasphemous libel, intituled "The Free Inquirer," tending to blaspheme Almighty God, and to ridicule, traduce, and discredit the Holy Scriptures; and to diffuse and propagate irreligious and diabolical opinions in the minds of his Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom (o). In the case of *John Wilkes* an information was exhibited against him by the Attorney-General (p), for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his Majesty's subjects; to introduce a total contempt of religion, modesty, and virtue; to blaspheme Almighty God; and to ridicule our Saviour and the Christian religion. In *The King v. Williams* (q), the defendant was convicted of having published a libel, intituled "Paine's Age of Reason," which denied the authority of the Old and New Testament; asserted that reason was the only rule by which the conduct of men ought to be guided; and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. In the case of *The King v. Eaton* (r), the defen-

(m) Hil. Term, 29 Geo. II. (1756); Dig. Law Lib. 83 and 126.

(n) Mich. T. 3 Geo. III. (1763); Dig. Law Lib. 84 and 128.

(o) The like information was exhibited in the same Term, against another defendant for printing and publishing; and against another defendant for publishing, the same

libel, *R. v. Dixwell*; and *R. v. Currie* Digest, Law of Libels, by a Gentleman of the Inner Temple (1765). p. 84.

(p) Sir Fletcher Norton, in Hil. T. 4 Geo. III.

(q) Before Lord Kenyon, C.J. at the Guildhall, 1797, 26 State Tr. 653.

(r) 31 State Tr. 927.

dant was convicted upon an information filed by the Attorney-General (s), of having published an impious libel, representing Jesus Christ as an impostor, the Christian religion as a mere fable, and those who believed in it as infidels to God; upon being brought up to receive judgment, though his counsel addressed the court in mitigation of punishment, no exception was taken to the legality or propriety of the conviction. CHAP. XXIV.

It appears, therefore, to have been long ago settled that blasphemy against the Deity in general, or an attack upon the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offence at Common Law. Result of authorities.

The same doctrine has been fully recognised in several subsequent cases. In *Rex v. Richard Carlile (t)*, the defendant was convicted of publishing two blasphemous libels. And in the case of *R. v. Waddington (u)*, which was an information by the Attorney-General, against the defendant, for publishing a blasphemous libel, the effect of the libel set out in the information was, to impugn the authenticity of the Scriptures; and one part of it stated, that Jesus Christ was an impostor, and a murderer in principle, and a fanatic. The defendant was tried at the Middlesex Sittings after Trinity Term, 1822, and convicted; Abbott, L.C.J. (x), directing the jury that any publication in which our Saviour was spoken of as an impostor and a murderer in principle, was a libel at Common Law. The defendant afterwards moved for a new trial, on the ground of misdirection by the judge in telling the jury that any publication in which the divinity of Jesus Christ was denied was a libel; and it was contended that since the 53 Geo. III. c. 160 was repealed, the denying one of the persons of the Trinity to be God was no offence; and consequently, that a publication in support of such a position was not a libel. But the ruling of the Lord Chief Justice was unanimously upheld; and Best, J., observed, "It cannot admit of the least doubt that this direction was correct. The 53 Geo. III. c. 160, has made no alteration in the Common Law relative to libel. If previous to the passing of that statute it would have been a libel to deny, in any printed work, Modern cases on the subject.

(s) Sir Vicary Gibbs, Knt., E. T. 52 Geo. III.

(t) 3 B. & Ald. 161, 167.

(u) 1 B. & C. 26; and *vide* the trial of Mr. Moxon (June 23rd, 1841), for blasphemy in publishing Shelley's

poem of "Queen Mab," 2 Townsh. Mod. St. Tr. p. 356. (See the observations of Blackburn, J., on this case, L. R. 3 Q. B. 374.)

(x) Afterwards Lord Tenterden.

CHAP. XXIV. the divinity of the second person in the Trinity, the same publication would be a libel now." And he added, "It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments published maliciously (which the jury in this case have found) is, by the Common Law, a libel, and the Legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law." The rule for a new trial was therefore refused (y).

The publication of a blasphemous libel on the Old Testament is indictable at Common Law.

It is also an indictable offence at Common Law to publish a blasphemous libel of and concerning the Old Testament. Lord Denman, C.J., having directed the jury, that, if they thought the publication tended to question or cast disgrace upon the Old Testament it was a libel (z): upon motion in arrest of judgment, it was contended:—1st. That the offence charged in the indictment being for a libel upon the Old Testament, it was not punishable at Common Law. That all the cases of indictment for blasphemy against the Holy Scriptures, were for matters directed against Christianity and religion together. 2ndly. That at the time of the cases referred to, all witnesses must have been sworn on the Bible, or the New Testament, but that it was not so now; and therefore the reason for holding that an attack upon Christianity would dissolve and weaken the bonds of society (viz.) by overthrowing or weakening the confidence in testimony given in courts of justice, no longer existed. But the court held, that although in most of the cases cited, the libel had been against the New Testament; yet the Old Testament was so connected with the New, that it was impossible that such a publication as the one in question could be uttered without reflecting upon Christianity in general; and therefore that an attack upon the Old Testament of the nature described in the indictment, was clearly indictable. And as to the argument that the relaxation of oaths was a reason for departing from the law laid down in the old cases, the court could not accede to it without saying that there was no mode by which religion holds society together but the administration of oaths; which was not the case, for religion, without reference to oaths, contained the

(y) See a copy of the Information filed in this case, St. Tr. 1 N. S. 1339. (z) *Reg. v. Hetherington*, 5 Jur. 529; 4 St. Tr. (N. S.) 563.

most powerful sanctions for good conduct: and Lord Denman, CHAP. XXIV.
C.J., observed, that those who had desired the dispensation from the taking of oaths to be extended, had done so from respect to religion, not from indifference to it. And per Littledale, J., "The Old Testament, independently of its connection with, and of its prospective reference to Christianity, contains the law of Almighty God; and therefore, I have no doubt that this is a libel *in law* as it has been found to be *in fact* by the jury." And per Patteson, J., "It is certain that the Christian religion is part of the law of the land. The argument that an indictment for a blasphemous libel is to be confined to blasphemy against the New Testament is untenable" (a).

In a recent case (b) the defendants were indicted for publishing in a newspaper called "The Freethinker," certain blasphemous and profane libels concerning Almighty God, the Holy Scriptures, and the Christian religion (c). At the trial Lord Coleridge, C.J., directed the jury that the great point for them to decide was—"Are these articles, within the meaning of the law, blasphemous libels? Now that, as you have been truly told, is a matter absolutely for you. On you is the responsibility, after looking at them and reading them, of saying whether they are or are not blasphemous libels" (d). . . . "Gentlemen, you have heard with truth that these things are, according to the old law,—if the *dicta* of old judges, *dicta* often not necessary for the decisions, are to be taken as of absolute and unqualified authority,—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But . . . these *dicta* cannot be taken to be a true statement of the law as the law is now. It is no longer true, in the sense in which it was true when these *dicta* were uttered, that Christianity is part of the law of the land (e). In the times when these *dicta* were uttered, Jews,

(a) *Reg. v. Hetherington*, 5 Jur. 529; 4 St. Tr. (N. S.) 563.

(b) *Reg. v. Ramsey and others*, 1 Cab. & El. 126.

(c) The libels were of an exceedingly gross and profane nature, derisive of the Old as well as the New Testament, and casting ridicule on the birth and divinity of the Saviour: and the publications were rendered the more mischievous and offensive by pictures or wood-cuts, called "Comic Bible Sketches" and "Divine Mummina-

tion," and they undoubtedly constituted the offence of blasphemy, within the law as laid down in the previous cases. The libels forming the subject of the indictment are set out in the report of the case contained in 1 Cab. & El. 126.

(d) 1 Cab. & El. 133.

(e) This and other parts of the ruling of the Lord Chief Justice have been expressly dissented from: *vide Pankhurst v. Thompson*, 3 Times L. R. 199, per Huddleston, B., and Manisty, J.

CHAP. XXIV. Roman Catholics, Nonconformists of all sorts, were under heavy disabilities for religion, were regarded as hardly having civil rights. Every thing almost, short of the punishment of death, was enacted against them. The epithet 'ferocious' which has been applied to the statute of Wm. III., to which so much reference has been made, is hardly stronger than that statute deserves." . . . "It is clear to my mind, that the mere denial of the truth of the Christian religion is not enough to constitute the offence of blasphemy." And the Lord Chief Justice proceeded to say—"It is my duty to lay down the law on the subject as I find it laid down in the best books of authority, and in 'Starkie on Slander and Libel,' it is there laid down as, I believe, correctly"—"There are no questions," &c. [reading the passage, *infra*, pp. 362—3, down to "boundary between right and wrong" (f)]. "Now that I believe to be a correct statement of the law, and I am not satisfied from my study of the cases on the subject that the law was ever laid down differently." The Lord Chief Justice then directed the jury that—"If the decencies of controversy are observed, the fundamentals of religion may be attacked, without a person being guilty of blasphemous libel" (g).

In another case, the Lord Chief Justice again laid down the law and directed the jury to the same effect as he had done in the previous case (h).

A person may, without being liable to prosecution for it, attack *Judaism* or any religious *sect*, save the established religion of the country; and the only reason why the latter is in a different situation from the others is, because it is *the form established by law*, and is therefore a part of the constitution of the country. In like manner and for the same reason, any general attack on *Christianity* is the subject of criminal prosecution, because Christianity is the established religion of the country (i).

With respect to the extent of the offence of blasphemy, and

The Offence is complete whether the blasphemy be oral or written.

(f) In 4th edition, 599, 560.

(g) 1 Cab. & El. p. 146; 15 Cox, C. C. 236. The jury being unable to agree, were discharged without giving a verdict.

(h) *The Queen v. Bradlaugh and others*, 15 Cox, C. C. 226. In the case of *The Queen v. Foote, Ramsey, and Kemp*, the defendants were indicted and tried before Mr. Justice North, for

unlawfully printing and publishing certain blasphemous libels in a newspaper called "The Freethinker." They were found guilty and sentenced, Foote to 12, Ramsey to 9, and Kemp to 3 months' imprisonment. *Vide* vol. 97, C. C. C. Sess. Pap. 607 (March 5th, 1883).

(i) *Reg. v. Gathercole*, 2 Lew. C. C. 254, per Alderson, B.

the nature and certainty of the words, it appears to be im- CHAP. XXIV.
material whether the publication be oral (*k*) or written; though
the committing such mischievous matter to print or writing,
and thereby affording it a wider circulation, is undoubtedly an
aggravation, and materially affects the measure of punishment.

The delivery of lectures with the object of endeavouring to Blasphemous
lectures,
illegality of.
show that the character of Christ was defective, and his teach-
ing erroneous, and that the Bible was no more inspired than
any other book, is illegal.

And where the defendant having agreed to let certain rooms Contract for
hiring rooms
for blasphemous
lectures
illegal.
to the plaintiff for the purpose of delivering lectures, afterwards
discovered that the object of the lectures was to propound such
doctrines, and declined to allow the rooms to be used for such
a purpose, in an action by the plaintiff for breach of contract
it was held, that the defendant might justify on the ground
that the plaintiff intended to use the rooms for illegal purposes;
and a plea to that effect was held to be an answer to the
action (*l*).

It may be observed, that all the recorded instances of prose- Matter and
manner of the
publication.
cution for blasphemy, subsequent to *Woolston's case*, have been
for publications of indecent, scoffing, and opprobrious language
against natural or revealed religion; and that in most of such
cases, the jury have been directed to look both to the matter
and the manner of the publication in order to decide on its
blasphemous quality: and in those cases where the defendants
have been convicted, the judges, in the remarks they have made
upon the mischievous tendency of the offence, have, usually,
founded their reasons for the punishment awarded, more upon
the offensive manner of the publication in the particular
instances, than upon the matter itself; and all have cautiously
avoided laying down any general prohibitory rule.

And both the matter and the manner of the publication may Profane and
derisive
caricatures.
render it more offensive in its nature and more mischievous
in its tendency, by profane and derisive illustrations, or
caricatures: as in the case of *The Queen v. Ramsey and
others* (*m*).

It may be asked,—Is every publication which *tends* to weaken Distinction
between
ridicule of the
Scriptures,
and discussions
on controver-
sial points.
any particular argument that has been adduced to prove the
existence of a superintending Deity, or the truth of Christi-

(*k*) *The King v. Atwood*, Cro. Jac. 421; *The King v. Taylor*, 3 Keb. Rep. 607; Vent. 293; *The King v. Sparling*, 1 Str. 497.

(*l*) *Cowan v. Milbourn*, 2 L. R. Ex. 230; 36 L. J. Ex. 124.

(*m*) *Supra*, p. 359, note (*c*).

CHAP. XXIV. anity, illegal and indictable? There can be no doubt as to the general right of inquiry and discussion even upon the most sacred subjects, provided the licence be exercised in the spirit of temperance, moderation, and fairness, without any intention to injure or affront. In the cases cited, the defendants were charged with having exposed Christianity and its doctrines to contempt and ridicule, for the purpose of introducing a *general* disregard of religion. And in *Woolston's case* the court desired it might be particularly noticed, that they laid stress upon the term *general*, and did not intend to include disputes between learned men upon controverted points.

There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of his creation; and although as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth, from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals,—a state of

Intention, the
criterion and
test of guilt.

apathy and indifference to the interests of society,—is the broad boundary between right and wrong. CHAP. XXIV.

If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrine, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete.

A defendant in conducting his own defence, on his trial for blasphemy, will not be permitted to justify the publication of the blasphemous matter, by re-asserting the substance of the sentiments contained in his blasphemous publications; nor to show that they are the sentiments and opinions of many learned persons; nor that in the opinion of such persons prosecutions for the publication of religious opinions are improper (*n*). And if a defendant in defiance of the judge's ruling and admonition, persists in so doing, he may be fined for contempt of court (*o*). And so also in a Scottish case, where the defendant, who conducted his own defence, was charged on an indictment with the publication of certain blasphemous works, with intent to bring the Holy Scriptures and the Christian Religion into contempt: it was held, by the High Court of Justiciary in Scotland, that he was not entitled, in his speech to the jury, to quote passages from the Bible for the purpose of justifying the character he had given to it in his libellous publications (*p*).

It is no ground for a new trial in the case of a conviction for the publication of a blasphemous libel, that the defendant was not allowed upon his trial to read and utter blasphemous matter, either as extracts from other books or as re-assertions of the substance of his blasphemous publications, by way of justification or defence (*q*).

The Libel Act, 1843 (6 & 7 Vict. c. 96), passed for "the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty," applies only to defama-

(*n*) *The King v. Davison*, 4 B. & Ald. 334; and see *The King v. Mary Carlile*, St. Tr. 1 New Series, 1034, 1049.

(*o*) *The King v. Davison*, *supra*.

(*p*) *Reg. v. Paterson*, 1 Broun, Sc. Rep. 634-5.

(*q*) *The King v. Davison*, 4 B. & Ald. 335; *The King v. Mary Carlile*, State Trials, 1 New Series, 1034, 1049.

Design of the author to occasion mischief.

Defendant on his trial not allowed to re-assert, nor to justify, the blasphemy.

No ground for new trial that judge refused to allow blasphemous extracts to be read.

The Libel Act has no application to Blasphemous Libels.

CHAP. XXIV. tory libels, and not to blasphemous, obscene, or seditious libels (*r*).

Separate trials where several jointly indicted.

Where three persons were jointly indicted for publishing blasphemous libels in a newspaper, two of whom (one as editor, the other as publisher) had already been convicted of publishing similar libels in another number of the same newspaper; it was ruled, on objection by the third, to be tried jointly with the other two, on the ground that he might be prejudiced in his defence, that he was entitled to be tried separately, and to call the other defendants as witnesses in his behalf (*s*).

After Verdict, etc., copies of Blasphemous and Seditious Libels may be seized.

By the statute 60 Geo. III. & 1 Geo. IV. c. 8 (*t*), intituled "An Act for the more effectual Prevention of Blasphemous and Seditious Libels," provision is made by section 1 for enabling the Judge or court, after verdict or judgment by default, to order all copies of such libels in the possession of the defendant to be seized. By section 2, such copies are to be restored in case the judgment be arrested or reversed (*u*).

CHAPTER XXV.

PUBLICATIONS TENDING TO SUBVERT MORALITY.

Offences against Public Morals.
Cases and authorities on the subject.
Nature of the Offence.
Indecent Exhibitions.
Immoral publications.
Statutes prohibiting Sale, &c., of Obscene Books, Pictures, &c.

Where intention is to attack the Roman Catholic Religion.
Report of a trial, setting out an obscene pamphlet.
Prohibition against sending obscene prints, &c., by post.
Indecent Advertisements prohibition.

CHAP. XXV.

Offences against public Morals are indictable.

It has long been established, that an indictment at Common Law may be supported for any offence against public morals or decency; though some doubt, as will appear from a brief

(*r*) *The Queen v. Duffy*, 9 Ir. L. R. 329; 2 Cox, C. C. 45; 6 St. Tr. (N. S.) 303; and see *Ex parte O'Brien*, L. R. (Ir.) 12 Q. B. 32. But see per Lord Coleridge, C.J., 15 Cox, C. C. 218 and 231.

(*s*) *Reg. v. Bradlaugh and others*,

15 Cox, C. C. 217, per Lord Coleridge, C.J.

(*t*) Sections 8 and 9 of this statute are repealed by 56 & 57 Vict. c. 61, Schedule.

(*u*) See the Statute, *verbatim*, in Appendix of Statutes, *infra*.

review of the cases, seems formerly to have been entertained CHAP. XXV.
upon this subject.

Sir Charles Sedley (a) was indicted for having exposed his naked body in a balcony in Covent Garden, and for having committed other indecent acts before a great multitude of people. The indictment was openly read to him in court; and afterwards, on being required to take his trial at bar, he submitted to it. From the different reports of this case it appears, that after the abolition of the Star Chamber, the Court of King's Bench was considered as the *Custos morum*, to whom the cognizance of such offences most properly belonged; and although it was afterwards contended that judgment was given against the defendant on account of the personal violence he used in throwing down bottles upon the mob, yet from the reports of the case it clearly appears that the judges considered the offence to have been committed against decency and morality; and found it necessary to interfere in those profligate times to punish such immodest practices, which the court said were as frequent as if not only Christianity but morality also had been neglected. In *Read's case* (b), the defendant was indicted for publishing a lascivious and obscene libel, and was tried and convicted before Lord Holt, C.J. On motion in arrest of judgment, on the ground that the offence was merely of spiritual and not of temporal cognizance, Lord Holt was of opinion that the offence ought to be punished in the Ecclesiastical Court (c). In *Curl's case* the Attorney-General exhibited an information against him for printing and publishing an obscene book, intituled, "Venus in the Cloister, or the Nun in her Smock." The defendant having been found guilty, it was moved in arrest of judgment, that the offence was of mere spiritual cognizance, that in the reign of Charles II. there was a run of obscene writings for which no prosecutions were instituted in the temporal courts, and *Read's case* was cited. It was answered by the Attorney-General (d), that to destroy morality was to destroy the peace of Government, since Government was no more than public order: that the spiritual courts punished only spiritual defamation *by words*; but that if it were reduced to writing, it would be a temporal offence

(a) 1 Keb. R. 206, pl. 95; 2 Str. 791; Fortesc. 99; Mich. 15 Car. II.; Sid. 168, pl. 29.

(b) *R. v. Read*, E. T. 6 Anne; Fortesc. Rep. 98, 99.

(c) The jurisdiction of the Eccle-

siastical Courts in suits for defamation in England and Wales was abolished by statute, 18 & 19 Vict. cap. 41; and in Ireland by 23 & 24 Vict. cap. 32.

(d) Sir Philip Yorke.

Cases and
authorities
on the subject.

CHAP. XXV. punishable as a libel. In *Rex v. John Wilkes* (e), an information was granted against him for printing and publishing an obscene and impious libel, intituled, "An Essay on Woman."

Nature of the Offence. Although many vicious and immoral acts are not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences (f) of a public nature.

Indecent letter to a woman, soliciting her chastity. Where the defendant wrote and sent to a respectable girl, a letter containing a proposal that she should surrender her chastity to him for a sum of money: upon an indictment charging the defendant with the publication of a false and defamatory libel, (after verdict of guilty) the conviction was sustained: and the court held, that the publication of such a letter might, under the circumstances of the girl's position and character, constitute a defamatory libel, such as would reasonably or probably tend to provoke a breach of the peace (g).

Indecent Exhibition and Performance. And where two travelling showmen, pursuing their calling on the Epsom Downs during the summer races, kept a booth or tent, into which they invited persons to pay and enter for the purpose of witnessing an indecent exhibition and performance by a naked man and woman: this was held to be a misdemeanour at Common Law, and indictable as such (h).

Indecent bathing. So also it is an indictable offence to undress on the beach and bathe in the sea near inhabited houses, from which the naked person may be distinctly seen; and this too, although the houses may have been recently erected; and though previously it may have been usual for men to bathe in considerable numbers at the place in question (i); and it matters not what the intention may have been, the necessary tendency of such conduct being outrageous to decency, and corruptive of the public morals. And accordingly it is no defence to an indictment for indecent exposure, by bathing in the sea near a public footway, that there has been as long as living memory extends, a usage so to bathe at the place (k).

The same principle extends to every species of indecent representation, whether by writing, printing, picture, or other manner of exposure; or that is openly or notoriously lewd or contrary to public morality. In short, whatever outrages public decency, and is injurious to public morals, and done

(e) 4 Burr. 2527.

(f) Sid. 168; Str. 790.

(g) *The Queen v. Adams*, 22 Q. B. D. 66; 58 L. J. M. C. 1.

(h) *Reg. v. Saunders and another*,

45 L. J. M. C. 11.

(i) *Rex v. Crunden*, 2 Camp. 89.

(k) *Reg. v. Reed and others*, 12 Cox, C. C. 1, per Cockburn, L.C.J.

in contempt of the laws of decency, is indictable as a misdemeanour (*l*). CHAP. XXV.

And the principle of the cases upon the subject of immoral publications appears to comprehend *oral* communications, when publicly made before an assembly of persons; if the nature of the communication is such that it tends to produce immorality (*m*).

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any public and indecent exposure of the person, or any public selling or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition; the offender may be "imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment."

Summary powers are given, by statute (*n*), to any metropolitan or other stipendiary magistrate, or to any two justices of the peace, upon complaint made before them, upon oath, that the complainant has reason to believe, that obscene books, papers, writings, prints, pictures, &c., are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, &c., to give authority by special warrant to any constable or police officer to enter any such house, &c., and to search for, and seize all such books, &c., and to carry the same before a magistrate or justice, who shall thereupon issue a summons calling upon the occupier to appear to show cause why the articles so seized should not be destroyed; and to order the articles so seized to be destroyed.

An order for the destruction, under the above section, of obscene books must contain an adjudication by the magistrate—1. That the books are obscene; and 2. That the books are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such. And therefore, where an order contained an adjudica-

(*l*) 1 Hawk. P. C. c. 5, s. 4; 4 Blac. Com. 65 (*n*); 1 East, P. C. cap. 1, s. 1; *R. v. Rouvierard*, cited in *R. v. Webb*, 1 Den. C. C. 338, 344; 2 C. & K. 933; *R. v. Watson*, 2 Cox, C. C. 376; *R. v. Webb*, 1 Den. C. C. 338; 18 L. J. M. C. 39; *R. v. Elliot*, 1 L. & C. 108; *R. v. Holmes*, 1 Dears.

C. C. 207.

(*m*) *Dugdale v. Reg.*, 1 Dears. C. C. 61 (on writ of error in the Court of Queen's Bench).

(*n*) 20 & 21 Vict. cap. 83, s. 1. See this Statute stated at length in the Appendix.

Statute as to punishment for indecency and exposing for sale, &c., indecent books, prints, &c.

Sale, &c., of Obscene Books, Pictures, Prints, and other Articles, prohibited.

Power to search for any such.

Order for destruction of.

Requirements of Order for destruction.

CHAP. XXV.

Death of complainant creates no lapse in proceedings.

A Case may be stated for Superior Court.

Where intention is to attack the Roman Catholic religion.

A Report of a Trial, setting out an Obscene Pamphlet is an Obscene Book, within the Statute.

tion only that the books were obscene, it was held bad on certiorari (*o*).

The proceedings for an offence under this statute being *quasi* criminal in their nature, do not lapse by the death of the complainant. And, therefore, where an order had been made by a magistrate for the destruction of certain obscene books found upon the premises of the defendant, and pending an appeal against the order to Quarter Sessions, the complainant died ; it was held, that the death of the complainant created no lapse, and that the order appealed against having been affirmed, it must be enforced in due course (*p*).

The power of appeal given by the statute does not supersede the jurisdiction of a magistrate to state a case for the opinion of a Superior Court, on a point of law arising under the statute (*q*).

Although the *intention* be, not to injure public morality, but to attack the Roman Catholic religion and practices, the sale of obscene works with that view is, nevertheless, an offence within the statute (*r*).

Shortly after the decision above stated, the same society (the Protestant Electoral Union) published a new edition of the pamphlet, in which some of the most obscene passages were omitted ; but there remained abundant matter of a disgusting and offensive nature, which rendered the book not distinguishable in principle from what was before the court in the former case : and one *Mackey* was tried at the Court of Quarter Sessions at Winchester, for selling copies of the new edition, but the jury being unable to agree, were discharged without giving a verdict : a report of the trial was afterwards published, in which the new edition of " The Confessional Unmasked " was set out at full length ; although at the trial it was not read aloud, but taken as read, and passages in it only, were referred to. In other respects the report was, substantially, a correct one of the trial and proceedings. A number of copies of this report having been seized at the shop of the appellant (where the same were sold and exposed for sale) were ordered by a police magistrate to be destroyed as obscene books within the meaning of the statute (*s*).

(*o*) *Ex parte Bradlaugh*, 3 Q. B. D. 509 ; 47 L. J. M. C. 105.

(*p*) *The Queen v. Truelove*, 5 Q. B. D. 336 ; 49 L. J. M. C. 57.

(*q*) *Steele v. Brannan*, 41 L. J. M. C. 85 ; L. R. 7 C. P. 261.

(*r*) *R. v. Hicklin and another*, 37 L. J. M. C. 89 ; L. R. 3 Q. B. 371 ; 11 Cox. C. C. 44.

(*s*) *Steele v. Brannan*, L. R. 7 C. P. 261 ; 41 L. J. M. C. 85 ; and *vide* 51 & 52 Vict. cap. 64, s. 3.

By the Post Office Act, 1870, the Postmaster-General is empowered from time to time, with the approval of the Treasury, to make regulations for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post-cards, having thereon, or on the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character (t).

CHAP. XXV.
Prohibition
against sending
obscene, or
libellous,
Prints, &c.,
by post.

The defendant was editor of a newspaper and inserted therein advertisements, which though not obscene, related to the sale of obscene books and photographs: the advertisers were foreigners resident abroad: a police officer wrote to the addresses given in the advertisements, and received in reply obscene books and photographs. The defendant was tried and convicted on an indictment charging him with causing and procuring obscene books and photographs to be sold and published, and to be sent by post in contravention of the Post Office (Protection) Act, 1884, s. 4, and the Court upheld and affirmed the conviction (u).

Advertising
Obscene Books
and Photos,
and sending
same by post.

By the Customs Laws Consolidation Act, the importation of any indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles, is prohibited, and such may be seized, and will be forfeited and destroyed (x).

Against im-
portation of
any such.

By a recent statute, the affixing to any house, wall, hoarding, &c., so as to be visible to any person passing along any street, highway, or footpath, or otherwise exhibiting to public view, of any picture, or printed or written matter, of an indecent or obscene nature, is made a summary offence, with liability to a penalty of 40s., or a month's imprisonment, with or without hard labour (y).

Indecent
Advertise-
ments.

(t) 33 & 34 Vict. cap. 79, s. 20; and see the Post Office Protection Act, 1884, 47 & 48 Vict. cap. 76, s. 4.

(1907), 388, C. C. R.

(x) 39 & 40 Vict. cap. 36, s. 42.

(y) 52 & 53 Vict. cap. 18, s. 3.

(u) *The King v. De Marny*, 1 K. B.

CHAPTER XXVI.

SEDITIONOUS LIBELS, AND DEFAMATIONS OF THE
CONSTITUTION.

*Publications against the Constitution.
What constitutes a Seditious Libel.
Recent authorities and directions to the
jury as to.
Seditious conspiracy to dissolve the
Union.
Seditious Libel a question for the jury.*

*Libels against the King and his
Government.
When words or writings amount to
Treason felony.
Libels on the Government.
Rulings of the judges as to in recent
cases.*

CHAP. XXVI.

Publications
against the
Constitution.

ANY member of the State has a right to suggest improvements in the constitution, and to point out what he conceives to be defects; and though he be mistaken in his views, yet he does not offend criminally, unless he be actuated by an intention to work mischief, evidenced by the licentious and insulting manner in which he treats of the established constitution and ordinances of the country. These, so long as they exist, ought to be secured from contumely and insult, lest men's minds should be excited on the one hand to effect a hasty and ill-judged demolition of the political fabric, or on the other should be provoked to acts of violence in defence of a political establishment which they hold in reverence.

"Every man may publish, at his discretion, his opinions concerning forms and systems of government; if they be wise and enlightening the world will gain by them,—if they be weak and absurd, they will be laughed at and forgotten;—if they be *bonâ fide* they cannot be criminal, however erroneous" (a).

The State and Constitution being the common inheritance, every attack made upon them, which affects their permanence and security, is in a degree an attack upon every individual, and concerns the rights of all (b).

Every subject of the King has an undoubted right to speak, to write, and to petition, within certain limits; but he must not, by reckless and seditious language, endanger the fundamentals of the constitution; he must not shake what is rooted, nor bring again into discussion, with a view of disturbing,

(a) Lord Loughborough, in the debate upon the Libel Bill, A.D. 1792.

(b) Holt, L. L. cap. 5.

what is settled ; he may impute error and suggest improvement ; he may present a memorial or a remonstrance, but he must not provoke the passions of the populace to overawe the laws, and recast the system of the State.

All writings, therefore, which tend to bring into hatred or contempt the King, the Government, or the constitution as by law established, to promote insurrection, or to encourage or excite the people to resist the laws, or the administration of justice, are termed seditious libels.

There appears to be no statutory definition of the term "seditious libel," other than that which is contained in the first section of the "Act for the more effectual prevention and punishment of blasphemous and seditious libels" : (c) by which it is enacted, that in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing "any seditious libel tending to bring into hatred or contempt, the person of his Majesty, his heirs or successors, or the Regent, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State, as by law established, otherwise than by lawful means" the judge or court is empowered to make an order for the seizure of all copies of the libel in the possession of such person or of any other person named in the order (d).

In *Harrison's case* (e) the defendant was convicted on an information charging him with having published concerning the Government of England, and the traitors who adjudged King Charles I. to death, that the Government of England consists of three estates ; and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. It was moved in arrest of judgment, that there can be no rebellion against the King, but it must be against the three estates, who are all united in the King. But the court overruled the objection, since by 13 Car. II. c. 1, it is expressed, that neither one nor both Houses

(c) 60 Geo. III. & 1 Geo. IV. c. 8, s. 1.

(d) See the section stated *verbatim* in Appendix of Statutes, *infra*. The definition given in this section seems to have been adopted by the Criminal Law Commissioners (of whom the late Mr. Starkie, Q.C., was the head) in

their Report, or Digest of Offences against the State inferior to Treason, *vide* 6th Report, 1841, Articles 46 and 48. *Vide* also Mr. Justice Stephen's Digest Cr. Law, Art. 91, p. 64, 3rd edition.

(e) *R. v. Harrison*, 3 Keb. 841 ; Vent. 324 ; Digest, Law Lib. 66, 67.

CHAP. XXVI. of Parliament can make war against the King, under any pretence whatever : and that though there be three estates as to making laws, there is but one authority as to war. In *Tutchin's case*, the defendant was convicted (*f*) for publishing in a paper called the "Observer," that there were mismanagements in the Government ; that for such they had a right to call their governors to account, to displace the ministers, dethrone the reigning sovereign, and to transfer their allegiance to whom they pleased. *Dr. Brown* (*g*) was convicted for writing a libel entitled "Mercurius Politicus," which asserted, "that the late revolution was the destruction of the laws of England." In *Richard Nutt's case* (*h*), the defendant was convicted, upon an information, for publishing a libel, entitled the "London Evening Post," in which it was suggested, that the revolution was an unjust and unconstitutional proceeding ; and the limitation established by the Act of Settlement was represented as illegal ; and it was asserted that the revolution and settlement of the Crown, as by law established, had been attended with fatal and pernicious consequences to the subjects of this kingdom. In the prosecutions of *Shebbeare* (*i*) upon an information for a libel, and of *Thomas Paine* (*k*), on an information for a similar offence, one ingredient, though mixed up with many others, was an attack upon the justice and policy of the revolution ; representing it as the origin and foundation of many political evils and calamities.

Recent authorities and directions to the jury in cases of seditious publications.

In the case of *The King v. Sir Francis Burdett* (*l*), a criminal information was filed by the Attorney-General for the publication of a seditious libel, which purported to be an address to the electors of Westminster (*m*). The jury were directed to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel, if of the latter, it was. That the question whether it was published with the intention alleged in the information, was

(*f*) 2 Ld. Ray. 1061 ; Salk. 51 ; 6 Mod. 268 ; Holt's Rep. 424 ; 5 St. Tr. 532.

(*g*) 11 Mod. 86.

(*h*) Digest, Law Libels, p. 68, 27 Geo. II. (1754), and *ibid.* 126.

(*i*) Hil. T. 31 Geo. II., 1758, K. B. MSS. ; *Res v. Dr. J. Shebbeare*.

(*k*) 32 Geo. III., 1792. K. B. MSS. : *Res v. Paine*, 22 St. Tr. 318.

(*l*) 3 B. & Ald. 717 ; and 4 *ibid.* 95, 314 ; and *vide* St. Tr. 1 N. S. pp. 1-170. The trial was before Best, J. (afterwards Lord Wynford).

(*m*) See a Copy of the Information, 4 B. & Ald. 115, note (*a*).

for their consideration. That the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that if its contents were likely to excite sedition, &c. [as alleged in the information], the defendant must be presumed to intend that which his act was likely to produce; that, if they found such to be the intent, he was of opinion it was a libel: that they were to take the law from him, unless they were satisfied that he was wrong. And this was held, *per totam curiam*, a correct mode of leaving the question to the jury under the Libel Act, 32 Geo. III. c. 60, s. 1. CHAP. XXVI.

Where the defendant was indicted for the publication of a seditious libel contained in a paper, purporting to be the resolutions of a body of persons calling themselves the "General Convention," containing (*inter alia*) the statement that—"the people of Birmingham are the best judges of their own right to meet in the Bull-ring or elsewhere; and are the best judges of their own power and resources to obtain justice." The jury were directed that, as to the first part of the statement, it was not seditious; but that they were to consider whether the words "the people are the best judges of their own power and resources to obtain justice," meant the regular mode of proceeding, by presenting petitions to the Crown, or either House of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and to excite them to tumult and disorder (*n*).

If a paper published by the defendant has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent, everyone must be taken to intend the natural consequences of what he has done (*o*).

In a subsequent case in Ireland, the law on the subject of sedition was thus laid down by a distinguished judge (*p*):— Sedition.
what is.
"Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval.

(*n*) *Reg. v. Collins*, 8 C. & P. 460, per Littledale, J.

(*o*) *Reg. v. Loret*, 9 C. & P. 462, per Littledale, J., and *vide The King v. Richard Carlile*, 4 C. & P. 417; St. Tr. 2 N. S. 464.

(*p*) Per Fitzgerald, J. (afterwards

one of the Lords of Appeal in Ordinary, appointed under the Appellate Jurisdiction Act, 1876), in his charge to the Grand Jury, on the trial of the cases *Reg. v. Sullivan* and *Reg. v. Pigott*, Ir. State Trials, 1868.

CHAP. XXVI. Sedition is in itself a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and the laws of the empire. The objects of sedition generally are, to induce discontent and insurrection, to stir up opposition to the government, and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action; and the law considers as seditious all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."

And this statement of the law was adopted and followed in a subsequent case, in which the jury were directed that—Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and laws of the empire (*q*).

Seditious
Pictures.

A seditious libel does not necessarily consist of written matter; it may be evidenced by a woodcut, or engraving of any kind; as in a case in Ireland, where certain pictures published by the defendant were found by the jury, under the direction of the court, to be seditious libels (*r*).

Seditious
Handbills.

The publication of a handbill, the contents of which have a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, is a seditious libel (*s*).

Seditious
Conspiracy to
dissolve the
Union between
Great Britain
and Ireland.

In the case of *O'Connell and others*, the defendants were charged, in several counts, with a seditious conspiracy, in maliciously and seditiously contriving, &c., to raise and create discontent and disaffection amongst the subjects of the Queen, to excite them to hatred and contempt of the Government and constitution of the realm; and to bring into disrepute, and diminish the confidence of her Majesty's subjects in the tribunals constituted for the administration of justice; and by procuring seditious meetings to be held, and by the demonstration of great physical force, to procure changes to be made in the

(*q*) *Reg. v. Burns and others*, 16 1868 : 11 Cox, C. C. 54, 55.
Cox, C. C. 355, per Cave, J.

(*s*) *Reg. v. Lorett*, 9 C. & P. 462.

(*r*) *Reg. v. Sullivan*, Irish St. Tr. per Littledale, J.

government, laws and constitution of the realm as by law established: and also with maliciously and seditiously combining and confederating to create discontent and disaffection amongst the liege subjects of the Queen, to excite them to hatred and contempt of the Government and constitution, and to unlawful and seditious opposition to the said Government and constitution: and by the means aforesaid, to bring about and accomplish a dissolution of the legislative union existing between Great Britain and Ireland: and by means of seditious and inflammatory speeches and writings, to bring about the changes aforesaid, and to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law, in contempt, &c. (t).

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If seditious articles, touching the laws and constitution of the United Kingdom, are published in the newspapers of a foreign country, the publication of copies of such articles in this country, or even extracts from them, cannot be justified. So, where publications advocating the cause of Fenianism were inserted in certain American newspapers, and then republished in Ireland as extracts from those papers; it was held that such republication could not be justified (u). And it is no justification for the publication of a seditious libel that other libels of a similar character have been published that have not been prosecuted (x).

No justification for a Seditious Publication that it was copied from another paper, whether local or foreign.

Where the indictment, or information, charges the publication of a seditious libel, "with intent," &c.; the intention alleged is a material matter for the consideration of the jury, and is peculiarly within their province. Such intention is to be collected from the paper itself. If it appears that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to have intended that which his act was likely to produce (y).

Intention, when a question for the jury.

The jury must determine the whole question, whether the publications charged in the indictment are or are not seditious libels; and they are the sole judges of the guilt or innocence of the defendant. If they find that the publications in question are libels, then they must find whether they were published with the intent alleged in the indictment (z); for to

Whether the publication is or is not a Seditious Libel, is a question for the Jury.

(t) *O'Connell and others v. The Queen*, 11 Cl. & F. 155; and *vide The King v. Edmunds and others*, for a seditious conspiracy, St. Tr. 1 N. S. 785.

(u) *R. v. Pigott*, Irish St. Tr. 1868; 11 Cox, C. C. 46-7.

(x) *Reg. v. Collins*, 9 C. & P. 461, per Littledale, J.

(y) *The King v. Burdett*, 4 B. & Ald. 95.

(z) And this, notwithstanding that the House of Commons has resolved

CHAP. XXVI. constitute crime the criminal act and the criminal intent should concur (a). If they come to the conclusion that the defendant published the articles in question; that the true meaning has been given to them by the innuendoes, and that they are seditious libels, published with the intention imputed to them, then they have all the elements which would warrant them in bringing in a verdict of guilty (b).

Seditious words uttered at unlawful meetings.

And *seditious words* spoken at an unlawful meeting or assembly may be the subject of indictment (c). And where in a prosecution for uttering seditious words with intent to incite to riot, it is proved, that previously to the happening of the riot, seditious words were spoken by the defendants; it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words so proved to have been spoken (d).

The Libel Act (1843) has no application to seditious publications.

Where to an indictment for publishing a seditious libel, the defendant pleaded a justification under the 6th section of Lord Campbell's Libel Act (e), it was held, on demurrer, by the Court of Queen's Bench in Ireland, that the statute did not apply to seditious libels; and therefore, that a justification under that section could not be pleaded to such an indictment (f).

Evidence of truth of seditious libel inadmissible.

And where, upon an application to take and return informations against the proprietors of a newspaper, for publishing a seditious libel, evidence was tendered under the Newspaper Libel and Registration Act, 1881 (g), of the truth of the libel, and that it was for the public benefit that it should be published. The magistrate refused to receive such evidence. Afterwards, upon an application to the Court of Queen's Bench in Ireland for a mandamus; it was held, that as no such matters could be given in evidence at the trial, the magistrate was right in refusing to admit the evidence at the preliminary inquiry; and that the application for a mandamus must be refused (h).

So also that it was for public benefit.

it to be a malicious, scandalous, and seditious libel, tending to create jealousies and divisions among her Majesty's subjects, and to alienate the affections of the people from the constitution, *Ree v. Reeves*, Peake's Addl. Cases, 84.

(a) *Reg. v. Sulliran*, 11 Cox, C. C. 51, per Fitzgerald, J.; *Reg. v. Pigott*, same vol. p. 60, per Deasy, B.

(b) *Ibid.* p. 52; and see "Seditious intention" defined in Stephen's Digest

Cr. Law, Art. 93, p. 65, 3rd edition.

(c) *Reg. v. Vincent and others*, 9 C. & P. 91.

(d) *Reg. v. Burns and others*, 16 Cox, C. C. 355, per Cave, J.

(e) 6 & 7 Vict. c. 96.

(f) *The Queen v. Duffy*, 9 Ir. L. R. 329; *The Queen v. M'Hugh* (1901), 2 Q. B. D. (Ir.) 569.

(g) 44 & 45 Vict. c. 60, s. 4.

(h) *Ex parte O'Brien* (1), L. R. (Ir.) 12 Q. B. D. 29.

Where on the trial of a defendant for publishing a seditious libel the jury disagree and are discharged without giving a verdict; the matter is still *sub judice*, and it is a contempt of Court to criticize the proceeding in a manner calculated to obstruct the course of justice (i). CHAP. XXVI.

So far as to publications which principally concern, abstractedly, the political establishment and constitution of the State. Libels against the King and his Government.

Another class, and one much more strongly and frequently tending to produce public irritation and disorder, consists of malicious publications of a more personal nature, affecting either the King or his government, or ministers of justice, or either House of Parliament, and tending to render them odious or contemptible.

It has frequently been held, that words committed to print or writing (and published) amount to an overt act of treason, in proof of the compassing the King's (k) death; but even in such case it seems that a publication must be proved, though in arbitrary times the contrary has been adjudged, particularly in the instances of *Peachum* (l), a clergyman, and of *Algernon Sidney* (m): the former of whom was convicted for treasonable passages in a sermon never preached, and the latter for some speculative opinions contained in papers discovered in his private closet; but so unsatisfactory did the grounds of these convictions appear, that Peachum was not executed, and the attainder of Sidney was reversed.

By the Treason Felony Act, 1848 (n), if any person within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose the King, his heirs, or successors from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of his Majesty's dominions and countries, or to levy war against his Majesty, his heirs, or successors, within any part of the United Kingdom, in order, by force or constraint, to compel him or them to change his or their measures or councils, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the When words or writings amount to Treason-Felony.

(i) *The King v. Freeman's Journal* 228; 5 Bac. Abr. 117. (1902), 2 Ir. Rep. K. B. 82.

(l) Cro. Car. 125.

(k) 2 Roll. 89, 90; Fost. 346; 11 Mod. 322; 1 St. Tr. 977; 3 St. Tr.

(m) Foster, 198.

(n) 11 & 12 Vict. c. 12, s. 3.

CHAP. XXVI. United Kingdom, or any other of his Majesty's dominions or countries under the obeisance of his Majesty, his heirs, or successors ; and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed ; every person so offending shall be guilty of felony.

An averment that the prisoner combined, conspired, confederated, and agreed with others, to levy war, &c., is an averment of a sufficient overt act, in support of an indictment (under the above section) for compassing to depose the Queen (o).

Contempt of
the King's
person.

At Common Law, any contempt of the King's person amounts, on principles of policy too obvious for observation or comment, to a high misdemeanour. Such a contempt may either consist in the imputing to the King the want of capacity or integrity (p), in charging him with a breach of his coronation oath (q), or, by maliciously asserting anything concerning him which tends to lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people. These are considered as high contempts and misprisions, and are punishable as misdemeanours at Common Law.

Denying the
Title of the
King to the
Crown.

So to deny the King's title to the Crown, or to raise doubts concerning it, in unadvised discourse, would amount to a contempt at Common Law ; and to do it deliberately and advisedly, if it did not constitute treason, would at least subject the offender to the penalties of a *præmunire* (r).

In the case of *John Wilkes* (s) the defendant was convicted upon an information filed by the Attorney-General, for printing and publishing a malicious libel, entitled "The North Briton, No. 45," tending to vilify and traduce the King and his government—to impeach and disparage his veracity and honour—and to represent and make it believed that his Majesty's most gracious speech, delivered from his throne to the Parliament, on Tuesday, the 19th day of April, 1763, contained many falsities and gross impositions upon the public ;

(o) *Mulcahy (in error) v. The Queen*,
1 Ir. L. R. C. L. 12.

(p) Hawk. P. C. c. 23 ; 4 Blac.
Com. 120.

(q) Noy, 105 ; Hawk. P. C. c. 23.
s. 5.

(r) 4 Blac. Com. 123 ; Hawk. P. C.

c. 17, s. 35.

(s) Digest Law Libels, 69. Informations were also filed against *Kearsley* and *Williams*, for printing and publishing the same. *Ibid.* ; and see *R. v. Lambert and Perry*, 2 Camp. 398.

and that his Majesty had suffered the honour and dignity of his crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the King and his government contemptible and odious, and to excite tumults, commotions, and insurrections, &c., &c. CHAP. XXVI.

In the case of *The King v. Harvey (t)*, it was held to be an indictable offence to publish falsely of the King, or of any other person, that he laboured under mental derangement.

The offence of encouraging or endeavouring to persuade any person to murder another, whether a subject of his Majesty or not, and whether within the King's dominions or not, may be completed, within the meaning of the statute (*u*), by the publication of an article in a newspaper, rejoicing in regicide and recommending others to follow the example of the regicide, although not specifically addressed to any one person. And so, where the defendant was indicted, under the statute above mentioned, for the publication of an article in a newspaper published in London, in the German language, exulting in the murder of the Emperor of Russia, and commending it as an example to revolutionists. The jury were directed, that if they thought that by the publication of the article in question the defendant did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the defendant guilty: and such was held to be a right direction (*x*).

Publication inciting to regicide and murder.

Next, as to libels on the Government. It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; when this boundary is overstepped, and the licence is abused either for the wanton gratification of private malice, in aiming a stab at the private character of a minister, under colour and pretence of discussing his private conduct; or where either public men or their measures are denounced in terms of obloquy and

Libels on the Government.

Boundary of privilege as to publication of opinions on subjects of public and common interest.

(*t*) 2 B. & C. 257; and *vide* 2 St. Tr. (N. S.) 2.

(*x*) *The Queen v. Mont*, 50 L. J. M. C. 113.

(*u*) 24 & 25 Vict. c. 100, s. 4.

CHAP. XXVI. contumely, under pretence of exposing defects and correcting errors, but in reality for the purpose of obstructing and impeding the administration of public affairs, or of alienating the affections of the people from the King and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution ; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal.

Writings of
political
Authors.

It has been said, with regard to the productions of a political author, that they should not be too hardly dealt with. Although the jury are to form their judgment upon the particular passage stated in the indictment or information, they may compare that with the whole book or article and see how it is qualified by it (y).

Rulings of
Judges as to,
in recent cases.

Every man has a right to give every public matter a candid, full, and free discussion. The people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult (z).

Privileges of a
Journalist, as
to discussion
of the acts
of the Govern-
ment.

And it was observed by a learned judge, in the course of his summing up to the jury, in a modern case in Ireland, "When you come to consider what a journalist may do, I have to point out that a journalist may (and, indeed, it is his duty) canvass and censure the acts of the Government of the State ; he is free to discuss their acts and their public policy ; and he may canvass, and if he thinks proper, censure the acts of Government and ministers, and above all, he is invited to consider what is of the greatest importance, the administration of the law. Justice demands that the errors of courts of justice shall be pointed out ; and all that is within the province of a public journal. But this course should be carried out with calm and temperate language. The man who criticizes the conduct of the Government ought not to impute improper motives ; and though he may point out that there is bad administration of justice, yet he should not use language that would indicate contempt of the laws of the land. When a public writer uses his privilege to create discontent and dissatisfaction, he becomes guilty of what the law calls sedition " (a).

(y) *Ree v. Reeves*, Peake's Addl. Cases, 84, per Lord Kenyon, C.J.

(z) *Reg. v. Collins*, 9 C. & P. 460, per Littledale, J.

(a) *R. v. Sulliran*, 11 Cox, C. C. 51, per Fitzgerald, J., and *vide supra*, 372, *The King v. Burdett*, and other cases there cited.

The principles which govern cases of the class here mentioned being the same as those already stated in the earlier part of this chapter with regard to libels of the Constitution, it is deemed unnecessary to cite more than a few of the cases in detail, as both are classed as seditious libels, and come within the same denomination as those already cited. Every case, indeed, falling within it is too intimately involved in its particular circumstances to admit of any abstract rules less general than the elements which have been laid down as essential to such an offence,—the plain intrinsic tendency of the communication to produce public disorder, and the malicious intention of its author (b).

In the case of *John Tutchin*, who was convicted upon an information for publishing several libels on the Government, Lord Holt, C.J., in summing up to the jury, observed, "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the Government. If persons should not be called to account for possessing the people with an ill opinion of the Government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished" (c).

Imputation of corruption in Officers of the Government.

John Clarke was found guilty upon an information, charging him with having printed and published a malicious libel, intituled "Mist's Weekly Journal," containing false, malicious, and seditious reflections on his late, and present Majesty, by drawing odious parallels, and thereby maliciously and falsely insinuating the Government to be tyrannical, and the ministry corrupt and abominable (d).

Imputing tyranny to the Government, and corruption to the Ministry.

Richard Franklin was found guilty upon an information, charging him with having printed and published a malicious libel, intituled, "No. 235, The Country Journal, or the Craftsman," containing an extract from a private letter from the Hague, with intent to disturb the happy state of the public peace and the tranquillity of the kingdom, &c., and to bring his Majesty's treaty of peace into contempt and disgrace, and also

Libel by attempting to bring a Treaty of Peace into contempt, and to traduce and vilify the Government.

(b) *Vide R. v. Bedford*, 2 Str. 789; *R. v. Owen*, K. B. MSS.; Digest Law of Libels, 67-8; *R. v. Lawrence*, 12 Mod. 311; Sid. 219; Rol. 773; Digest Law Lib. 121; *Rex v. Beare*, 12 Mod. Rep. 219; Holt's Rep. 422, Lord Raym. 418; Bac. Ab. tit. Libel, 450,

and the cases cited *supra*.

(c) 5 St. Tr. 532, A.D. 1704; and *vide The King v. Bell*, *infra*.

(d) 9 St. Tr. 27, A.D. 1729; and *vide The King v. Fisher and others*, *infra*.

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to detract, scandalize, traduce, and vilify the administration of his Majesty's Government of the kingdom, and his principal officers and ministers of State, and to represent them as persons of no integrity or ability, and as enemies to the public good of the kingdom, &c. After the evidence was concluded on the part of the Crown, the Counsel for the defendant offered to prove some of the contents of the libel to be true. He was immediately interrupted by Lord Raymond, C.J. :—"As for your saying that you can prove what is charged on the defendant to be true, it is my opinion that it is not material whether the facts charged in a libel be true or false, if the prosecution be by indictment or information ; and that writing and printing may be libellous, though the scandal is not charged in direct terms but only ironically." His lordship added :—"And the law reckons it a great offence when the libel is pointed at persons in a public capacity, as it is a reproach to the Government to have corrupt magistrates, substituted by his Majesty, and tends to sow sedition and disturb the peace of the kingdom. Therefore I shall not here allow of any evidence to prove that the matters charged in this libel are true, for I am only abiding by what has been formerly done in other cases of the like nature" (e).

Libel on the
administration
of the Irish
Government.

Libel on
the Lord
Lieutenant
and Lord
Chancellor of
Ireland.

In the case of *The King v. Cobbett*, an information was filed by the Attorney-General against the defendant, for a libel published in the "Weekly Register," in the form of a letter signed *Juverna*. It was a libel upon the administration of the Irish Government, and upon the public character and conduct of the Lord Lieutenant and Lord Chancellor of Ireland. Mr. Cobbett was not the author, but merely the publisher of this letter. After the libel had been proved, and the defendant's counsel heard, Lord Ellenborough, in his charge to the jury, observed, "It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether wrapt in one form or another." And his lordship added, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the Government. But if, in so doing, individual feelings are violated, there the line of interdiction

(e) *Rez v. Franklin*, 9 State Trials, 255.

begins, and the offence becomes the subject of penal visitation" (f). CHAP. XXVI.

A criminal information was filed against the editor of "The Atlas" newspaper, for a libel published in that paper traducing the Lord Chancellor, Lyndhurst. The libel stated that there was a rumour that he had been charged with bartering ecclesiastical livings, and was to be dismissed from his office. The defendant was tried before Lord Tenterden, C.J., at Westminster, on the 24th December, 1829, and found guilty (g). Libels on the Lord Chancellor. Lyndhurst, imputing corruption in Office.

A criminal information was also filed *ex officio*, against three other defendants for a libel on the Lord Chancellor, Lyndhurst, published in the "Morning Journal" newspaper, imputing that he had corruptly advised the appointment of Mr. Sugden (h) to the office of Solicitor-General. The defendants were tried before Lord Tenterden, C.J., on the 23rd December, 1829, and found guilty (i).

Criminal informations were also filed, *ex officio*, by the Attorney-General against the same defendants for a seditious libel on the King, the Government, and his Ministers, published in the "Morning Journal" newspaper. The defendants were tried before Lord Tenterden, C.J., on the 22nd December, 1829, and were severally found guilty. The defendants Fisher and Alexander were fined, imprisoned, and ordered to find sureties for their good behaviour. The defendant Gutch was afterwards discharged on his own recognizances (k). Seditious libels on the King, the Government, and Ministers.

A criminal information was also filed, *ex officio*, by the Attorney-General (l) against the three defendants, for seditious libels, published in the "Morning Journal" newspaper, on the Government, and Ministers of the Crown. The defendants were tried before Lord Tenterden, C.J., at Westminster, on the 24th December, 1829, and were severally found guilty. The defendants Alexander and Isaacson were fined,

(f) Other cases may be referred to, in which the same doctrine has been repeated in the judgments of the court upon defendants convicted of public libels. In the case of *The King v. Cobbett*, K. B. 1810, for a libel, tending to incite disaffection in the army; and the cases of *The King v. Gale Jones*, and *The King v. Drukar*, the same general principles were expounded and applied; see also *Tutchin's case*, *O'Connell's case*, and others cited *supra*, pp. 372, 374.

(g) *The King v. Bell*, MS. Cr. Off. Rec. M. T. 10 Geo. IV.; and *ride Moo. & Mal.* 440.

(h) Afterwards Lord St. Leonards.

(i) *The King v. Fisher, Alexander, and Gutch*, MS. Cr. Off. Rec. M. T. 10 Geo. IV.

(k) *The King v. Fisher, Alexander, and Gutch*, MS. Cr. Off. Rec. M. T. 10 Geo. IV., and *ride Moo. & Mal.* 433.

(l) Sir James Scarlett, Knt.

CHAP. XXVI. imprisoned, and ordered to find sureties for their good behaviour (m).

Libel on the Duke of Wellington as Prime Minister.

An indictment was preferred against the same defendants for a libel on the Duke of Wellington, as Prime Minister. The libel was published in the "Morning Journal" newspaper, and imputed (*inter alia*) that the Duke was guilty of disloyal intentions towards the King, and was capable of a design to overthrow the Throne, and prostrate the laws and liberties of England. The defendants were tried before Lord Tenterden, C.J., at Westminster, on the 24th December, 1829, and were found guilty (n).

CHAPTER XXVII.

CONTEMPTS OF COURT.

General Jurisdiction as to Contempts.
Libels on Judges, when punishable as Contempts.
What Courts have Jurisdiction to punish for Contempts.
Courts of Record, what are.
Superior Courts, their Jurisdiction as to Contempts.
Judicial proceedings at Chambers, Contempts in relation to.
Courts of Quarter Sessions, Contempts of.
County, and other Inferior Courts, Contempts of.

Courts Martial, Contempts of.
Colonial Courts, Contempts of.
Division and Classification of Contempts:—
 CLASS 1. *Contempts committed in the face of the Court.*
 CLASS 2. *Contempts committed out of Court by some publication reflecting on proceedings pendente lite.*
 CLASS 3. *Contempts by disobedience to Orders of Court.*
 CLASS 4. *Contempts by other acts tending to obstruct the course of Justice.*

CHAP. XXVII. CONTEMPTS OF HIS Majesty's Courts of Justice, and scandalous reflections on judicial proceedings, are misdemeanours requiring prompt suppression, and appropriate punishment; since nothing tends more to disturb public order and to incite to disobedience of the law, than contemptuous reflections on the administration of justice.

General Jurisdiction as to Contempts.

Courts of justice have an inherent power to vindicate their own dignity and authority. Such a power is coeval with their first foundation and institution. By our Constitution the

(m) *The King v. Marsden, Alexander, and Isaacson*, MS. Cr. Off. Rec. M. T. 10 Geo. IV.

(n) *The King v. Marsden, Alexander, and Isaacson*, MS. Cr. Off. Rec. M. T. 10 Geo. IV., and vide *Moo. & Mal.* 439.

reigning Sovereign is the fountain of every species of justice CHAP. XXVII.
which is administered in this kingdom (a) ; and as such, the King delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King in his Courts of Justice, as his representatives.

Contempts of his Majesty's Courts (b) of Justice are, therefore, contempts of his Crown and dignity, and are punishable as such.

And notwithstanding the statute of Magna Charta, that none are to be imprisoned, *nisi per legale iudicium parium suorum*, it is one part of the law of the land to commit for contempts, and confirmed by the statute of Westm. 2 (c).

And the issuing of attachments by the Supreme Courts of Justice for contempts committed out of Court, stands upon the same immemorial usage as supports the whole fabric of the Common Law ; it is as much the "*lex terre*," and within the exception of Magna Charta, as the issuing of any other legal process whatsoever (d).

It is moreover *necessary* that a Court of Justice should have the power of vindicating its dignity by removing obstructions to its proceedings, compelling obedience to its process, and punishing those who obstruct or resist its authority. For it would be in vain that the Crown has conferred upon its judges and ministers of justice the power to act in its behalf in the administration of the law, if there were a power above the law having a right to resist it. The power to administer the law would then be but a power of contention against a state of anarchy. Necessity of power to punish contempts.

The power possessed by Courts of Justice of punishing for contempts, is therefore essential to the due administration of justice. It is, however, a power which should only be used when absolutely necessary ; always with forbearance and discretion ; and only in the interests of justice. How to be used.

Offences of this nature may consist either in the more gross violation of decency by making use of contumelious and insolent language in the face of the court ; or in the publication of scurrilous abuse of a judge, with reference to his conduct as judge, in a judicial proceeding ; or in the publication of reflections on the purity of its proceedings, tending to obstruct General nature of the offence.

(a) *Vide* 12 Co. 25.

25.

(b) By the word "Court" is meant the Judges who constitute it.

(d) *Vide The King v. Almon*, Notes of Judgments by Sir J. Eardley Wilmot, C.J., p. 254.

CHAP. XXVII. the course of justice; or by calumniating the parties concerned in causes before the court, and in prejudicing the minds of the public against suitors and others, before the cause is heard.

As judges, magistrates, and others entrusted with the administration and execution of the law, are the servants of the law, as well as of the State, it is peculiarly the policy of the law to protect them in the discharge of the duties of their respective offices: and accordingly, libels against judges and magistrates have been regarded as more immediately directed against the authority of the law, and as an offence deserving of a more exemplary punishment than libels of private individuals (e).

Libels on Judges, when punishable as Contempts.

Libels on his Majesty's judges and ministers of justice, though sometimes punishable as contempts of court, are more usually the subject of criminal information. When punishable as a contempt, the question is not whether the publication is a libel, but whether it contains reflections on the administration of justice, in a proceeding pending before the court: if it does, it may be punished as a contempt of court, if otherwise, only as a libel. But if the publication be not only a libel on the judge personally, but also on the administration of justice, in a matter pending before the court; then it is punishable not only as a contempt of court for the libel on the administration of justice, but also by criminal information or indictment for the personal libel on the judge.

Libel on Lord Chancellor Bacon.

It is a matter of history that in former times offences of the kind were punished with cruel severity. Amongst the earlier cases, one of the most notorious is *Wrennum's case*, in which the Attorney-General exhibited an information in the Star Chamber. Wrennum, who was a man of rank and education, was charged in that information with a libel, traducing the Lord Chancellor Bacon, in a petition to the King, complaining of his treatment by the Lord Chancellor in a suit in the Court of Chancery, by which he had been ruined. The Court of Star Chamber found him guilty, and sentenced him to the cruel and infamous punishment of perpetual imprisonment; to pay a fine of £1,000; to be twice pilloried; and to lose both his ears (f).

Libel on the Court of Arches, and the Judge.

In a subsequent case, the defendants, for writing and pub-

(e) See 5 Co. 125; 9 Co. 59; Hob. 215; 5 Mod. 43, 167; and see *The Queen v. Langley*, 2 Salk. 698. (f) 16 Jac. I. (1618); Popham, 135; Digest Law Libels, 106.

lishing two letters, scandalizing the Court of Arches, and Sir William Bird the judge thereof, were fined by the Court of Star Chamber, the husband in £200 and the wife in £100, and both committed to the Fleet (*g*). CHAP. XXVII.

For a seditious libel against the Privy Council and the judges, the defendant was committed to the Fleet during the King's pleasure, and fined £3,000 (*h*). Libel on the Privy Council and Judges.

In another case, one Jeffe was indicted for a libel directed to the King, against Coke, then late Chief Justice, in respect of a judgment delivered in the case of Magdalen College, affirming the said judgment to be treason, and speaking of the late Chief Justice as "Traitor and perjured judge." This libel he affixed to the great gate at the entrance to Westminster Hall; he also affixed copies at divers other places. Being arraigned, he put in a scandalous plea, affirming that he would not plead otherwise. It was adjudged by the Star Chamber that he be committed to the marshal, stand upon the pillory, be imprisoned till he submitted to every court, be bound to his good behaviour, with sureties during his life, and pay a fine of £1,000 to the King (*i*). Libel on Lord Chief Justice Coke.

In modern cases, defendants have been more humanely treated. Where Lord Mansfield, C.J., had made an order out of court for amending an information for libel, the defendant published a pamphlet reflecting on the Lord Chief Justice for having so done; representing the amendment as having been made "officiously, arbitrarily and illegally": a rule was granted requiring the defendant to show cause why an attachment should not issue against him for contempt (*k*). Modern cases of libels on judges.

In a subsequent case, an information was filed by the Attorney-General against the defendants for printing and publishing in a newspaper, called "The Independent Whig," certain libels, with intent to bring the administration of justice into contempt, and to defame and vilify Lord Ellenborough, Chief Justice of the Court of King's Bench. The libels were contained in certain letters which represented his lordship as disgracing his high station, and preventing justice being done Libel on Lord Chief Justice Ellenborough.

(*g*) *Whitacre v. Moody and ux.*, 3 Car. I. (1628); Append. to 3 Rush. Col. 7; Digest Law of Libels, by "A Gentleman of the Inner Temple" (1765), p. 109.

(*h*) *The King v. Perkins*, *Ibid.*

(*i*) *The King v. Jeffe*, 5 Car. I.; Cro. Car. 175; 15 Vin. Abr. 89; and

vide also other cases in Digest L. L., by "A Gentleman of the Inner Temple" (1765), p. 108 *et seq.*

(*k*) *The King v. Almon*, Hil. 5 Geo. III.; Notes of Judgments by Sir J. Eardley Wilmot, late L.C.J. of the Court of Common Pleas, p. 243.

CHAP. XXVII. to a person who sought it at his hands in court; alluding to a case which had then lately been tried before his lordship. The letters were in the highest degree defamatory and scurrilous. The defendants were found guilty (l).

Libel on Judge
and Jury after
trial and
verdict.

In another case, an information had been filed by the Attorney-General against *White and another* (m), for an abusive comment on the conduct of Mr. Justice Le Blanc, and a jury, by whom a person had lately been tried for murder and acquitted. Upon the trial of the defendants for the libel, Grose, J., directed the jury, that in case they were of opinion that the publication had been made, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into contempt the administration of justice in this country, they ought to find the defendants guilty.

Ridicule and
contempt of a
Judge of
Assize.

And where a judge of assize having a case to try in which the details were of an obscene nature: by way of warning and advice to the newspaper reporters, before the trial commenced, stated with reference to the trial of that case that as there was no protection in the case of a newspaper publishing obscene and indecent matter, he hoped and believed that his advice would be taken, after the trial and conviction, and whilst the learned judge was still sitting, one of the local newspapers published a scurrilous attack upon the judge, holding him up to ridicule and contempt with reference to his observations so made upon the case before the trial: such was held to be a contempt of court, and upon the application of the Attorney-General on the Crown side of the Queen's Bench Division, the defendant was ordered to show cause why he should not be committed to prison for his contempt; and on showing cause and apologising, he was fined £100 and £25 for costs (n).

Committals for
scandalous
reflections on
Courts of
Justice now
seldom resorted
to.

But although the publication of scandalous matter reflecting upon a judge in his administration of justice, may amount to a contempt of court, committals for such have of late years seldom been resorted to, except in cases of a very gross nature; occupants of the judicial Bench having acted with commendable forbearance, and left to public discrimination attacks upon and comments derogatory or scandalous of them in their judicial capacity.

(l) *The King v. Hart and another*,
K. B. E. T. 1808; 48 Geo. III.; vide
10 East, 94; and see *Butt v. Conant*,
1 Brod. & Bing. 548; 4 Moore, 195.

(m) 1 Camp. 359.

(n) *The Queen v. Gray* (1900), 2
Q. B. 36.

But in small Colonies, consisting principally of coloured populations, the enforcement, in a proper case, of committal for contempt for scandalous attacks upon the court in its administration of justice, may be necessary for the preservation of its dignity, and the enforcement of its judgments and decrees (o). CHAP. XXVII.
In Colonial Courts essential.

The jurisdiction in contempt exists in the interest of the public, as a safeguard of the due administration of justice. Any act done or writing published which is calculated to bring the Court, or the judge of a Court, into contempt, or to lower his authority, is a contempt of Court. Further, any act done, or writing published, which is calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts, is a contempt of Court (p). Jurisdiction in Contempts, a safeguard.

All Courts of Record, Inferior as well as Superior, and whether of civil or criminal jurisdiction, have power to punish for contempts committed in the face of the court. But Inferior Courts not of Record have no power (except where expressly given them by statute) to punish for contempts other than those committed in the face of the court: whereas the Superior Courts, and some Inferior Courts of Record, punish for contempts of both classes. What Courts have jurisdiction to punish for Contempts.

There is a distinction between a power to punish for contempt, and a power to remove for disorderly conduct; the one being a judicial power, the other an ordinary power for the necessary preservation of order, which may be used by all Courts Inferior as well as Superior.

Courts of Record are of three classes:—1. Supreme; 2. Superior; 3. Inferior. Courts of Record, what are.

1. The Supreme Court of this Kingdom is the High Court of Parliament, consisting of King, Lords, and Commons (q). The Supreme Court of Judicature in England was constituted by the Judicature Act of 1873 (r), which consolidated into one court under the name of "The Supreme Court," the then existing Court of Chancery, the Superior Courts of Common Law, and the Courts of Admiralty, Probate and Divorce.

2. The Superior Courts of Record, as constituted by the Judicature Acts, are, The High Court of Justice, and the Court

(o) *McLeod v. St. Aubyn* (1899), A. C. 549.

(p) *Per Lord Russell, L.C.J., in The Queen v. Gray*, 16 T. L. R. (1900), pp. 305-6.

(q) As to contempts of Parliament and other legislative assemblies, *vide* Chapter XXIX., *infra*.

(r) 36 & 37 Vict. c. 66, s. 3 (amended by various subsequent statutes).

CHAP. XXVII. of Appeal (s). And by a subsequent Statute (t) the term "Superior Courts" means and includes:—As to England, his Majesty's High Court of Justice and his Majesty's Court of Appeal, and the Superior Courts of law and equity in England as they existed before the constitution of his Majesty's High Court of Justice: and—as to Ireland, the Superior Courts of law and equity at Dublin: and—as to Scotland, the Court of Session.

The Court of the Railway and Canal Commission is also a Court of Record (u).

3. Inferior Courts of Record, as ordinarily so called, are Corporation Courts, Courts Leet, and Sheriff's Törn, &c. (x).

Courts not of Record, are Courts Baron, and the old County and Hundred Courts.

A Court that is not of Record, cannot impose any fine on an offender, nor award a *capias* against him (y).

Every court having power to fine and imprison is thereby made a Court of Record; the proceedings of which can only be removed by writ of error or *certiorari* (z). It appears therefore, that wherever there is jurisdiction erected with power to fine and imprison, that is a Court of Record; and what is there done is matter of record (a). And this too, though the power be given *de novo*, by Act of Parliament (b).

Superior
Courts, their
jurisdiction as
to Contempts.

The Superior Courts of Record have power to punish not only for contempts committed in the face of the court, but also for contempts in the nature of publications reflecting on its proceedings, or on the parties concerned in such proceedings, in matters pending before the court; though they be published whilst the court is not sitting, and at some distance of time and place. And the question whether the particular publication be a contempt or not, is for the court to determine (c).

Judicial
proceedings at
Chambers,
Contempts in
relation to.

Contempts of court in relation to judicial proceedings of the Superior Courts at Chambers, have usually been punished, not by the judge whilst presiding at chambers, but by the court of which the judge is a member, as a contempt of the court itself. It is however, not to be assumed (although the point has never

(s) 36 & 37 Vict. c. 66, ss. 16, 17 and 18.

(t) 39 & 40 Vict. c. 59, s. 25.

(u) 51 & 52 Vict. c. 25, s. 2.

(x) Bac. Abr. tit. Courts (D.) 1.

(y) *Vide Godfrey's case*, 11 Co. Rep.

43 b.

(z) Bac. Abr. tit. Courts (D.) 2.

(a) Vin. Abr. tit. Court (I.) 7.

(b) *Ibid.*, 12 Mod. 388, per Holt, C.J.; Carth. 494.

(c) *Vide Crawford's case*, 13 Q. B.

628, 630.

been actually decided by the English Courts) that a judge of a Superior Court has no power at chambers to punish for contempt there committed (*d*). A judge, whilst presiding at chambers, is as much in the administration of justice as when in court (*e*). But the judges of the various courts who discharge judicial functions at chambers, as ancillary to the general business of the court, have not assumed to themselves the powers of a Court of Record in this respect, and there appears to be no instance in which a judge at chambers has punished for a contempt (*f*). But the judge at chambers, as well as the officials of the court, are under the protection of the court: and any contempt of the proceedings at chambers, or of the judge, the masters or other officers, causing an obstruction to the course of justice, may be punished by the court by attachment or otherwise (*g*).

And so, where a solicitor immediately after appearing in support of an application before a judge at chambers, abused his opponent in the hall, and at the outside entrance to the Royal Courts of Justice, calling him a "liar" and a "perjured scoundrel," and shaking his fist in his face; the learned judge, upon the facts being brought before him when sitting in court as vacation judge, committed the offender for contempt of court: and the Court of Appeal in upholding the committal, said that the offender had undoubtedly been guilty of a contemptuous interference with the administration of justice; that it did not follow that because there was no contempt in the court, there was none of the Court: that it was not necessary to consider whether a judge in chambers had power to commit for contempt, because the offender was committed by the judge, not in chambers, but in court, in respect of contempt which occurred in connection with proceedings at chambers. And it was held, that the learned judge had ample jurisdiction and power to make the order of committal, and that he had rightly exercised his judicial discretion in so doing (*h*).

Where the defendant was in contempt for not putting in an answer to a bill in Chancery, and being brought up in custody

Judge's private residence: order of commitment for contempt made at.

(*d*) *Vide In re Johnson*, *infra*, per Lord Esher, M.R., and Bowen, L.J.

(*e*) *Vide* Notes of Opinions and Judgments by Sir J. Eardley Wilmot, Knt., C.J., in *Rez v. Almon*, 243.

(*f*) *Vide* the observations of Lord Abinger, C.B., in *Rez v. Faulkner*, 2

C. M. & R. 533; 2 Mont. & Ayr. 339.

(*g*) *Vide Lechmere Charlton's case*. 2 Myl. & Cr. 316; *Van Sandau v. Turner*, 6 Q. B. 773; *Ex parte Van Sandau*, 1 Phillips, 445.

(*h*) *In re Johnson*, 20 Q. B. D. 68: 57 L. J. 1.

CHAP. XXVII. was taken before Lord Langdale, M.R., at his lordship's private residence, when an order was made for his committal to prison; reciting that the prisoner being "brought to the bar of the court" "and still persisting in his contempt," &c., it is ordered, &c., an application was afterwards made for a *habeas corpus*, when it was urged, that the order of commitment was bad as having been made at a place where the court had no jurisdiction (*viz.*) at a private house, and not at the "bar of the court": but the court held, that the statement in the order could not be controverted, nor could affidavits be received to show that the order was made elsewhere than in the place which the Master of the Rolls had adjudged to be the bar of his court (*i*).

Contempts, in proceedings before the Masters.

The protection afforded to persons attending the judge at chambers, equally applies to persons attending the masters, and other officers of the court. The contempt is not of the master, but of the court of which he is an officer. And accordingly, any contemptuous interference with or obstruction to the course of justice, with reference to any proceeding before a master or other officer of the court, is punishable by the court as a contempt (*k*). But where one of the parties attending a reference for taxation before the master, used insulting language to the other during the reference; and after leaving the master's office assaulted his opponent on the steps outside the office, Coleridge, J., refused to grant an attachment against the offender, but left the party aggrieved to his remedy by indictment or by application to the court for a criminal information (*l*).

Courts of Quarter Session, Contempts of

Courts of Quarter Sessions are Courts of Record, and have power to punish contempts by fine or committal.

A Court of Quarter Sessions committed Lord Preston for refusing to be sworn to give evidence to the grand jury on a bill for high treason. And on a *habeas corpus* the court bailed him. But Holt, C.J., said it was a great contempt, and had he been there he would have fined him, and committed him till he paid the fine (*m*). And a Court of Quarter Sessions fined a barrister-at-law for a contempt in insulting one of the jury, in the course of his address in defence of a prisoner (*n*).

(*i*) *In re Clarke*, 2 Q. B. 619, 633.

N. S. 805.

(*k*) *Lechmere Charlton's case*, 2 Myl. & Cr. 316.

(*m*) *The King v. Lord Preston*, Vin. Abr. "Contempt," 446; 1 Salk. 278.

(*l*) *Ex parte Wilton*, 1 Dowl. P. C.

(*n*) *In re Puter*, 33 L. J. M. C. 142.

But if the Court of Quarter Sessions treat as a con-tempt, that which there is no reasonable ground for so treating, the Court of Queen's Bench will interfere to protect the party against whom such power has been improperly exercised (o). CHAP. XXVII.

A Coroner has power to fine a witness to an amount not exceeding 40s. for contempt in refusing, without lawful excuse, to answer a question put to him by the coroner, or for non-attendance after being duly summoned to give evidence on the inquest (p). Coroner, power of, to fine for Contempt.

By the County Courts Act, 1888 (q), County Courts are made Courts of Record. But they have no power to commit for contempts other than those occurring in the face of the court. But for any wilful insult or interruption of the proceedings of the court, the judge may order the offender into custody, and detain him until the rising of the court; and the judge is empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to prison for any time not exceeding seven days, or to impose a fine not exceeding 5*l.*; and in default of payment thereof to commit the offender to prison for any time not exceeding seven days, unless the said fine be sooner paid (r). County Courts, their jurisdiction to punish contempts.

It is for the judge to decide as to the nature of the interruption or misbehaviour; and where the offence is committed against the judge himself, it will be sufficient to state in the warrant that the offender wilfully insulted him (s).

But an order of committal for contempt must specify in what particular the party was guilty of contempt, so as to enable him to purge his contempt; and if the Order does not contain the necessary particulars, it is bad for uncertainty (t).

A warrant issued at the rising of the court, for the committal to prison of a person guilty of contempt during the sitting of the County Court, is not irregular; although the judge orally committed him to prison at the time of the offence, and afterwards, on his declining to withdraw the contemptuous words, sentenced him to pay a fine of £5, or be committed to prison for six days in default, which sentence was duly recorded by the registrar; and although the warrant was an absolute

(o) *Ibid.*, 148, per Cockburn, L.C.J.
 (p) 50 & 51 Vict. c. 71, s. 19, sub-ss. 2, 3 and 4.
 (q) 51 & 52 Vict. c. 43, s. 5.
 (r) *Ibid.*, s. 162.
 (s) *Lery v. Moylan*, 10 C. B. 211.
 (t) *Reg. v. Lambeth C. C. Judge*, 36 W. R. 475.

CHAP. XXVII. committal, and did not follow the terms of the sentence recorded (u).

Assault upon a
County Court
Officer.

An assault upon a County Court Bailiff whilst in the execution of his duty as such, is a contempt; and no appeal lies from an Order of a County Court Judge imposing a fine upon the offender, under s. 48 of the County Courts Act, 1888 (x).

A County Court judge has no power to deal summarily with contempts committed out of court (y).

County Court
may commit
for dis-
obedience to
its Orders.

By virtue of the Judicature Act, 1873, s. 89, and the R. S. C. (z), a County Court has power to commit for disobedience to its orders, whether interlocutory or final (a). And a County Court judge sitting in bankruptcy, has power under the Bankruptcy Act (b) to commit a person to prison for disobedience to an Order, made under the Bankruptcy Act, directing him to attend before the court and give evidence as to the estate of a bankrupt (c).

Justices of the
peace, and
Courts of
Petty Session.

Justices of the peace, and Courts of Petty Session, have power at common law to punish, by fine or by immediate committal, or by committal in default of payment of fine, for any gross contempt committed in the presence of the justices, whilst in the actual execution of their offices as such: though if they think proper to proceed less summarily, by indictment, they may do so (d): or they may require the offender to find sureties to be of good behaviour; and may commit in default of sureties (e). But where the contempt is not committed in the presence of the justices, but out of court, then, however gross it may be, and though in writing, the justices have no power to commit, but must proceed by indictment or by application to a superior court for a criminal information (f).

A justice of the peace in punishing for a contempt, cannot commit for punishment except by warrant in writing (g). And so where a justice *verbally* committed a constable for contempt, the committal was held illegal (h). And the commitment

(u) *The Queen v. The C. C. Judge of Stafford*, 57 L. J. Q. B. D. 483; 36 W. R. 797.

(x) *Lewis v. Owen* (1894), 1 Q. B. 102.

(y) *Reg. v. Lefroy*, L. R. 8 Q. B. 135; *S. C. nom. Ex parte Jolliffe*, 42 L. J. Q. B. 121.

(z) Ord. XLII. r. 7.

(a) See *Richards v. Cullerne*, 7 Q. B. D. 623; *The Queen v. Sir R. Harrington* (*Martin v. Bannister*), 4

Q. B. D. 212, 491; 48 L. J. 300.

(b) 1869, s. 66; 1883, s. 169.

(c) *The Queen v. Croydon C. C. Judge*, 53 L. J. Q. B. D. 545.

(d) *Rex v. Rerel*, 1 Str. 420; *Rex v. Elliot*, 2 Str. 786.

(e) *Vide infra*, p. 421.

(f) *Cro. Eliz.* 78; *Salk.* 697; *Holt.* 654; 12 Mod. 514.

(g) *Mayhew v. Locke*, 7 Taunt. 63.

(h) *Ibid.*

must be for a time certain; which must be specified in the warrant. If the commitment be "until he shall find sureties to keep the peace," it will be bad: for, as observed by Lord Denman, C.J., "without some express limitation in the warrant, a poor man, who is unable to find sureties, may be imprisoned for life" (i).

Where the justices of a borough, committed the defendant for non-payment of a fine set on him for a contempt of court; the defendant brought a *habeas corpus*; but the court held it a good commitment (k).

Justices of the peace are judges of record, appointed by the Crown, deriving their authority from the King as the fountain of justice, and appointed as conservators of the peace (l). A justice of the peace, as such, is peculiarly protected by the law in the just execution of his office; and if slandered in his presence, and in the execution of his duty, the offender is liable to be punished; and may be indicted, or required to find sureties for good behaviour, or perhaps be committed by the justice (m).

By the 14 & 15 Vict. c. 93, s. 9 (Ireland), justices in petty sessions are expressly empowered to commit for contempt, for any period not exceeding seven days, or to impose a fine on the offender, not exceeding 40s. It has been held, that this enactment applies to professional (as well as other) persons, engaged in a case at hearing before the justices. And so, a solicitor, while practising at petty sessions, was committed to gaol by the presiding magistrates for contempt of court (n).

By the County Voters Registration Act, 1865 (o), any revising barrister, when revising the lists of a county, city, or borough, is empowered to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same.

But a revising barrister has no power to have a person turned out of court for misconduct which occurred on a former occasion at a court held in the previous year (p).

In the year 1892 an Act was passed (q) by which contempts

(i) *Prickett v. Gratrex*, 8 Q. B. 1029; *The King v. James*, 5 B. & Ald. 894.

(k) *Rex v. Elliot*, 2 Str. 786.

(l) *Vide* Bac. Abr. "Justices of the Peace."

(m) *See per* Fitzgerald, J., in *The*

Queen v. Rea, 17 Ir. C. L. R. 595.

(n) *In re Jno. Rea* (2), L. R. (Ir.) 2 Q. B. D. 429; *Ibid.*, 4 Q. B. D. 345.

(o) 28 Vict. c. 36, s. 16.

(p) *Willis v. MacLachlan*, L. R. 1 Ex. D. 376; 45 L. J. 689.

(q) 2 & 3 Wm. IV. c. 93, s. 2.

Justices in
Ireland.

Revising
Barristers
Courts.

Contempts in
the Ecclesiastical
Courts.

CHAP. XXVII. of the ecclesiastical courts, in the face of the court, or any other contempt towards such court or the process thereof, are directed to be signified to the Lord Chancellor, who is to issue a writ *de contumace capiendo* for taking into custody persons charged with such contempts; such person not being a peer, lord of Parliament, or member of the House of Commons.

Courts Martial,
Contempts of.

Any person subject to military law, who is guilty of contempt of a Court Martial, by using insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such court, may be committed by the court into military custody; and such court may either order him to be tried by another Court Martial, or, after hearing or giving him an opportunity of answering his contempt, may, if the court think it expedient, by order under the hand of the president, commit the offender to prison, with or without hard labour, for a period not exceeding twenty-one days (r).

Where a person not subject to military law, is guilty of any contempt towards a Court Martial, by using insulting or threatening language, or by causing any interruption or disturbance in its proceedings, or by printing observations, or using words calculated to influence the members of or witnesses before such court, or to bring such court into disrepute; the president of the court martial may certify the offence of such person to any court of law in the part of His Majesty's dominions where the offence is committed, which has power to commit for contempt; and that court may after hearing any witnesses against or on behalf of the accused, and any statement in defence, punish or take steps for the punishment of such person in like manner as if he had been guilty of contempt of that court (s).

Isle of Man,
Courts of.

The Court of Chancery of the Isle of Man is a Court of Record, and has power to punish for contempts, whether committed in the face of the court, or out of court. And so, where it has committed a party for contempt in publishing, out of court, in a newspaper, matters considered by the court to be defamatory of its proceedings, the High Court of Justice in England will not interfere by *habeas corpus*, unless there has been some error in the manner and form of the proceeding (t).

(r) *Vide* the Army Act, 1881, s. 28.

(s) *Ibid.*, s. 126, sub-s. 3. It should be observed that a court martial has the power, whilst sitting, of ordering the removal and exclusion from the

court, of any person, whether subject to military law or not, who wilfully interrupts the proceedings of the court.

(t) *In re Crawford*, 13 Q. B. 613, 623.

All colonial Courts of Record have power to punish for contempt of court. The supreme (or superior) colonial courts have similar powers to those of the High Court of Justice in England, and punish for contempts whether committed in the face of the court or out of court (u). CHAP. XXVII.
Colonial
Courts.

The High Court of Judicature in India has power to suspend a member of the English bar from practice as an advocate in that court, for contempt of court, in publishing a libel reflecting on the judges of that High Court in their official capacity (x). Judges in India
punish for
contempt.

According to modern authorities, all legislative assemblies possessing judicial functions have the power of vindicating themselves from contempts; this power, however, does not belong to all colonial legislative assemblies. The English House of Commons, though possessing no judicial functions, has an authority to commit, founded upon ancient usage. In the exercise of this power the court or assembly must themselves be the judges of the necessity for doing so; and it is clear that one court cannot question the proceedings for contempt by any other court. The reply of the judges to the question put by Lord Eldon in the House of Lords, in the case of *Sir Francis Burdett v. Abbot* (y), is decisive as to that. The question was, "If the Court of Common Pleas committed for a contempt without stating any reason, would this court, or any other court in Westminster Hall, interfere and set the prisoner at liberty by reason of the generality of the warrant?" The answer was, by all the judges, that no such thing could be done. Legislative
assemblies.

Division and Classification of Contempts.—The subject, Contempts of Court may, properly, be classified and arranged under four different heads or divisions (viz.)— Division and
Classification
of Contempts.

1. Contempts committed in the face of the court; as by some insult or open act of defiance to the presiding judge; or by some wilful interruption of the proceedings.

2. Contempts committed out of court, by some wrongful interference with the administration of justice; as by some publication reflecting on proceedings pending before the court, or on parties concerned in such proceedings.

3. Contempts by disobedience to the lawful judgments, decrees, or orders of the court.

(u) *Vide McDermott's case*, L. R. 1 P. C. C. 260, and *In re Pollard*, L. R. 2 P. C. C. 106; and *infra*, p. 423.

(x) *Re S. B. Sarbadhicary* (1906), 95 L. T. R. 894 (P. C. Ap.).

(y) 14 East, 1; 5 Dow, 165, 199.

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4. Contempts by other acts tending to prejudice or obstruct the course of justice :—as by threats or attempts to intimidate, to bribe, or otherwise unduly influence any person concerned in the administration of justice; as a judge, juror, or officer of the court, or a witness in or party to proceedings pending before the court.

Contempts
committed in
the face of the
Court.

CLASS 1.—*Contempts committed in the face of the court.*—It is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it (z).

Generally, any contemptuous or contumelious words, when spoken to the presiding judge or magistrate of any court of record, in the execution of the duties of his office, are punishable as contempts; whether the person guilty of the offence be party to the proceedings or not (a).

General
principles as to
Contempts of
Court.

The principle upon which the jurisdiction is founded in all cases of contempt of court is, the wrongful interference with, or obstruction to, the administration of justice.

A judge, whose sworn duty it is to punish crime when established by legal proof, and brought before him judicially, is not to sit and hear the law defied in his presence, with impunity. The law therefore arms him with an authority to fine and imprison offenders for contempts committed in the face of the court. In the case of an insult to himself, it is not on his own account that he commits, for that is a consideration which should never enter his mind. But, though he may despise the insult, it is his duty to support the dignity of his station and to uphold the law, so that in his presence at least, it shall not be infringed. Although therefore, it is necessary that courts of justice should have the power to punish for contempts, it is a power which has its justification in necessity alone, and should be exercised cautiously and discreetly; and never but in those cases where the necessity is plain and evident.

A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. It does not depend on the mere words, but partly on the manner; very often on the previous conduct. Contempt may be shown either by language or manner (b).

(z) *Sparks v. Martyn*, 1 Vent. 1. 1 Sid. 144.

(a) Cro. Eliz. 78. 581; Ray. 78; 1 (b) See *Curus Wilson's case*, 7 Q. B. Keb. 451, 465, 508; 2 Roll. Rep. 78; 1015.

Where a party was engaged in the business of his suit before the justices of assize, and one R. assaulted him in the presence of the judge; he was forthwith committed to the ward of the sheriff (c). CHAP. XXVII.
Assault in Court.

The taking and carrying away of a document *in custodia curiæ*, in defiance of an express order of the judge, is a gross contempt, for which the offender may be committed *instantanter* to prison (d). Defiantly taking away a document *in custodia curiæ*.

A defendant conducting his own defence, on his trial for a misdemeanour, may be punished for contemptuous expressions applied to the judge in the course of making his defence to the jury; as in a case where the defendant, being indicted for the publication of a blasphemous libel, conducted his own defence at the trial, in the course of which he made several offensive observations concerning the Christian religion, derogatory to the character of persons not before the court. After being repeatedly warned by the judge that his so doing was highly improper, and that if he persisted he should be obliged to use the means he had to restrain him: to which the defendant replied—"My Lord, if you have your dungeon ready I will give you the key." For this expression the learned judge fined him £20. He afterwards made use of other expressions reviling the Christian religion, and stating that—"the Bishops are generally sceptics"; for which the learned judge imposed other fines. A rule *nisi* having been obtained on an affidavit by the defendant that by the imposition of these fines he was intimidated in his defence, and omitted material parts of it, consisting of various authorities selected from the writings of ecclesiastics and others; that the interruptions of the judge and the impositions of the fines, paralyzed his energies and prevented him from making an impression on the jury in his favour, and from obtaining a verdict of acquittal: the court held, that no ground was shown for the granting of a new trial: that if any embarrassment arose it was owing to his own pertinacity: and that the judge was justified in stopping the defendant in the line of defence he pursued, and in fining him, after warning, for persisting in it (e). And Abbott, L.C.J., in his judgment, observed,—“If I thought that the decision I am about to pronounce could have the effect of restraining any person, who may hereafter stand

(c) Vin. Abr. "Contempt," A. 6.

(e) *The King v. Davison*, 4 B. & Ald.

(d) *Watt v. Ligertwood*, L. R. 2 Sc. 329.

App. H. L. 362.

CHAP. XXVII. on his trial, from making a bold as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question whether the law of the land shall or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public; and a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power,—more especially where it is to be exercised on the person of a defendant,—is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion cannot in any other way be prevented, in my opinion a judge will betray his trust who does not put it in force" (f).

So, where a defendant, on his trial for an assault, in addressing the court made use of violent expressions towards the prosecutor, the court ordered and adjudged him to enter into recognizances with two sureties to be of good behaviour for two years, and to be imprisoned till such security is given (g).

Witness fined for contempt in refusing to answer.

And where a witness, on the trial of an information for bribery, refused to answer a certain question lest his answer should tend to criminate him: and on being told by the judge of assize that he was completely protected by a statutory certificate of indemnity, he still persisted in his refusal; whereupon the judge committed him to prison for six months and fined him £500: it was held, that the judgment was not subject to review by a Court of Appeal (h).

Refusal to give up name of writer of libel.

But the proprietor and editor of a newspaper in which a libellous letter has been published, cannot be compelled to give up either the manuscript of the letter or the name of the writer of it: and his refusal to do so does not constitute a contempt of court (i).

Contempt by High Sheriff defying the Order of Judge of Assize.

And, as already shown, the rank or dignity of the offender affords no excuse (k); on the contrary, it is sometimes an

(f) *The King v. Davison*, 4 B. & Ald. 333.

(g) *Rex v. Mahon*, 4 A. & E. 576.

(h) *Ex parte Fernandez*, 6 H. & N. 717; 10 C. B. N. S. 3.

(i) *In re* a special reference from

the Bahama Islands (1893), App. Cas. 138; S. C., *nom. In re Moseley*, 62 L. J. P. C. C. 79.

(k) *Vide Lord Preston's case, supra*, p. 392.

aggravation of the offence ; as in a case where, in open defiance CHAP. XXVII. of the Order of a judge of assize, that a certain part of the assize court be cleared, the high sheriff of the county issued a placard, and caused it to be posted on the outside walls of the court in which the judge was sitting. The placard complained of the order given by the presiding judge (Blackburn, J.), and objected that the public had been barred out of court ; protesting against the proceeding as unlawful, and stating that he (the sheriff) had given orders that the court should be kept open ; and concluded in these words, " And I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the court." Cockburn, L.C.J. (who was presiding in the adjoining court), on being informed of the placard, directed that the sheriff should be ordered to attend the judges ; when, after calling upon the sheriff for his explanation, the Lord Chief Justice fined him £500 (*l*). So, also, it is a contempt if the high sheriff proceed to address the grand jury in open court, in opposition to the prohibition of the presiding judge (*m*).

If a counsel, in conducting a case for his client, wantonly, unnecessarily, and unjustifiably insult one of the jury, it is an abuse of the privilege of counsel, and a contempt of court, for which the presiding judge may properly punish (*n*). Contempt by insult to jurymen.

CLASS 2.—*Contempts committed out of court, by some wrongful interference with the administration of justice.* Publications reflecting on parties, and proceedings pending before the Court.

Contempts of the class here stated are sometimes of a very provoking and mischievous nature ; inasmuch as they have a tendency to incite contempt for the administration of justice and disobedience to the law ; or to create a prejudice against its administrators, or against the parties concerned in matters pending before the court ; or to bias or unduly influence jurors, witnesses and others, before the cause is heard.

The principle upon which the jurisdiction is founded in this as in other classes of contempt is, the wrongful interference with the administration of justice. The matter complained of must therefore be such as, in the opinion of the court, might reasonably have a tendency to prejudice or unduly influence, either favourably or unfavourably to one side or the other, the Principle upon which the jurisdiction is founded.

(*l*) *In re The Sheriff of Surrey*, 2 F. & F. 236.

(*m*) *Ibid.*, 234.

(*n*) *In re Pater*, 33 L. J. M. C. 142.

The Orators of Athens were restrained in their public harangues, and subject to a fine for contumelious language.

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tribunal appointed for the trial of the case, the hearing of the application, or the investigation of the subject-matter of the litigation—as the judge, the jury or other responsible administrators of the law; or the parties, witnesses, or others concerned in the litigation.

In considering the class of offences falling within this division, which embraces by far the most numerous of the cases of either class of contempts, it should be observed, that the question for the determination of the court is not whether the publication is a defamatory libel on the party or parties concerned, but whether it is a contempt of court. Where the court is called on to put in force its arbitrary power of punishing for contempt, it must be satisfied that the contempt alleged has been proved, and that the applicant is entitled to its interference and protection. Where defamatory matter is published of a party to legal proceedings, he has his remedy as in other libels, by action-at-law, or by indictment: but he cannot call upon the court to treat the libel, however gross, as a contempt of court, unless it be such as to bring it within the true doctrine of contempt as established by law. But if, notwithstanding that it be a libel, it is also a contempt of court, then the court will deal with it as a contempt.

Judges and courts are open to criticism, and if reasonable arguments and expostulations are offered against any judicial act as being contrary to the law or the public good, no court would or could treat that as a contempt of court. But it must be remembered that in this matter the liberty of the press is no greater than the liberty of every subject of the realm (o).

Where a libellous letter had been published in a colonial newspaper, reflecting on the chief justice of the colony; it was held, that although the letter was such that it might have been the subject of proceedings for libel, yet not being in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, it did not constitute a contempt of court (p).

And, as observed by Lord Chancellor Hardwicke, on motion to commit the printers of a newspaper, on account of their having published a libel upon some trustees, in a matter pending before the Court of Chancery,—“Notwithstanding that this

(o) Per Lord Russell, L.C.J., in *The Queen v. Gray*, 16 T. L. R. (1900), p. 306.

(p) *In re* a special reference from

the Bahama Islands (1893), App. Cas. 138; S. C. nom. *In re Moseley*, 62 L. J. P. C. C. 79.

should be a libel, yet, unless it is also a contempt of the court, I have no cognizance of it; for whether it be a libel against the public, or against private persons, the only remedy is to proceed at law" (q). CHAP. XXVII.

But all attempts to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard, are contempts (r). Persons concerned in the business of the court are considered as under the protection of the court, and are not to be driven to their remedy at common law for libels upon them in that respect (s). And therefore, the court will punish, as for a contempt, those who make the publication of its proceedings the vehicle of a libel upon persons so concerned (t).

And a publication of *ex parte* statements which have a tendency to prepossess people as to pending proceedings in a judicial matter, is a contempt of court (u). So also the publication of a pamphlet by the committee of a lunatic, with an address to the Lord Chancellor by way of dedication, reflecting upon the conduct of those acting in the management of the affairs of the lunatic under orders of the Court of Chancery (x).

Publication of
ex parte
statements.
Contempt by
Committee of a
Lunatic.

Where, pending proceedings in court, imputations were made in a newspaper, reflecting on the plaintiff and his witnesses, and representing the proceedings as "vexatious and unprincipled," and the affidavits as containing "glaring misrepresentations, which the editor believed and heartily hoped would lead to an indictment for perjury"; such were held to be contempts of court (y).

Reflections in
newspapers,
on parties,
witnesses, and
proceedings
pendente lite.

And where, pending a petition for the winding up of a company, and with full knowledge of the fact, comments are made in a newspaper reflecting on the case from the point of view of one of the litigants, such is a contempt of court, and punishable as such (z).

In order to justify an application to the court for committal for contempt, the publication complained of must be such as

Actual interference with
administration
of justice, the
ground for
committal.

(q) *Roach v. Read and another*, 2 Atk. 469.

(r) *Ibid.*, 469.

(s) *Ex parte Jones*, 13 Ves. 238.

(t) *Brook v. Evans*, 29 L. J. Ch. 616; 8 W. R. 688.

(u) Per Lord Hardwicke, C., in *Mrs. Farley's case*, 2 Ves. sen. 520.

(x) *Ex parte Jones*, 13 Ves. 237.

(y) *Little v. Thomson*, 2 Beav. 129,

per Lord Langdale, M.R.; *Felkin v. Herbert*, 33 L. J. Ch. 294; 10 Jur. 62, Ch. per Kindersley, V.-C.; *In re Allison*; *Peters v. Bradlaugh*, 4 Times L. R. 414, 417, per Manisty and Hawkins, JJ.; and see *Reg. v. O'Dogherty*, 5 Cox, C. C. 348, 355.

(z) *In re Crown Bank (Ltd.)*, *In re O'Malley*, 44 Ch. D. 649; 59 L. J. 767.

CHAP. XXVII. really to interfere with the administration of justice. The power possessed by the court in such cases is, undoubtedly, a salutary power, but it ought not to be put in force except in those cases where there are serious grounds for its exercise. The applicant must therefore show that the publication he complains of is intended, or at least, calculated, to prejudice the administration of justice (a).

The Court will not exercise its power to commit, unless satisfied that the article complained of was prompted by the fact that litigation was pending (b): and that the comments complained of were made with intent unfairly to affect the trial of pending litigation, and so were calculated to interfere with the course of justice (c).

Tendency to
prejudice
accused on his
trial.

Where pending an investigation before magistrates, of a charge of wilful murder, certain disparaging statements as to the past life of the accused were published in a newspaper, such were held (by the King's Bench Division) to be a contempt of court, tending to prejudice him upon his trial (d).

And where a person charged at petty sessions with an indictable offence, triable either at assizes or quarter sessions, newspaper reflections are made upon the accused which the Divisional Court of King's Bench consider are calculated to prejudice the trial of the accused; the editor or publisher of the newspaper is liable to fine and attachment for the contempt, notwithstanding that at the time of publication of the matter complained of, the accused had not been committed for trial (e).

Frivolous and
vexatious
motions
dismissed
with costs.

Where motions to commit for contempt of court are made upon frivolous or insufficient grounds, they will be treated by the court as vexatious and an abuse of its process, and will be dismissed with costs (f).

And, where the application is not *bonâ fide*, but is made with the object of obtaining a money compromise, such will be treated as an abuse of the process of the court (g).

(a) *Vide The Queen v. Payne and another* (1896), 1 Q. B. 577.

(b) *In re Labouchere, Kensit v. The Evening News* (1901), 18 T. L. R. 208.

(c) *Phillips v. Hess* (1902), 18 T. L. R. 400; *In re Labouchere and another, Ex parte The Columbus Co.* (1901), 16 T. L. R. 578; and *vide The King v. Dolan and others* (1907), 2 K. B. D. (Ir.) 260.

(d) *The King v. Parke* (1903), 2 K. B. 432.

(e) *The King v. Davies*, 1 K. B. (1906), 32.

(f) *In re Martindale* (1894), 3 Ch. 193; 64 L. J. 9; and see *Fairclough v. The Manchester Ship Canal Co.* (1896), 13 Times L. R. 56; *Vernon v. Vernon*, 40 L. J. Ch. 118; 19 W. R. 404; *In re Gold Coast Exploration Co.* (1901), 1 Ch. 860.

(g) *The King v. Parke* (1903), 2 K. B. 432, 444.

It has been held that the exhibiting in an assize town of inflammatory publications concerning a prisoner about to be tried at the assizes for a crime, is not a contempt for which the judge of assize can interfere to prevent by commitment (*h*). CHAP. XXVII.

It is a contempt of Court to publish in a newspaper the contents of a petition, filed in court, for the winding up of a company, but which petition had not then come on for hearing (*i*). And, *a fortiori*, it is a gross contempt to publish in a newspaper, with adverse comments thereon, the contents of affidavits filed in a suit before they have come before the court (*k*). And so also even without comments (*l*). Publication of contents of petition.
Of affidavits :

And where a statement of claim contained charges of dishonourable conduct against the defendant : before the hearing of the action, the plaintiff sent copies of the statement to persons not parties to the action : he was held guilty of a contempt of court (*m*). And so also where a defendant made defamatory comments on the plaintiff's action, in the margin of the statement of claim, and sent a copy thereof, with the marginal comments, to the plaintiff (who was a clergyman) and enclosed a letter in which he expressed his intention of having the statement of claim, with the comments thereon, and copies of his letters, reprinted and sent round to the clergy, addressed from the " Clergy List " : this was held to be a contempt, as abusive of a party to, and tending to prejudice the fair trial of, the action (*n*). Of statement of claim.

And where, pending the trial of an action for the infringement of a trade mark, the plaintiffs issued a circular discussing the merits of the case and charging the defendants with fraud and dishonesty ; it was held, that although the plaintiffs might be at liberty to warn the trade by circular, the introduction of a discussion of the merits of the case before trial was a contempt of court (*o*). Circular discussing the merits of case.

Where a petition is pending for the compulsory winding up

(*h*) *R. v. Gilham*, 1 M. & M. 165, per Little Dale and Gaselee, JJ. ; *The King v. Joliffe*, 4 T. R. 285.

(*i*) *In re The Cheltenham and Swansea Wagon Co.*, 38 L. J. Ch. 330 ; L. R. 8 Eq. 580.

(*k*) *Tichborne v. Mostyn*, 15 W. R. 1072 ; L. R. 7 Eq. 55 (n. 1) ; *Regina v. Castro and others*, *infra* ; and see *The American Exchange, &c. v. Gillig*, 58 L. J. Ch. 706, per Stirling, J.

(*l*) *Cann v. Cann*, 3 Hare, 333,

n. (*a*) ; 2 Ves. sen. 520.

(*m*) *Bowden v. Russell*, 46 L. J. Ch. 414 ; 36 L. T. 177 ; see *Cheshire v. Strauss*, *In re O'Connor*, 12 Times L. R. 291.

(*n*) *Kitcat v. Sharp*, 52 L. J. Ch. 134.

(*o*) *Coats v. Chadwick* (1894), 1 Ch. 347 ; 63 L. J. 328, per Chitty, J. But see *In re New Gold Coast Exploration Co.* (1901), 1 Ch. 860.

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of a company, it is a contempt of court to issue a circular to the shareholders containing misrepresentations, with the intent to obtain a resolution for the voluntary winding up of the company, and thereby to mislead the court and prevent a compulsory winding up order from being made (*p*).

Publication of other matters tending to excite prejudice.

And, in fact, whatever tends to prejudice a cause; whatever matter is published to the world, referring to the parties to a pending litigation, and to the subject-matter of it, in such a way as to excite a prejudice against them or their litigation, is a contempt of court (*q*).

And where the defendant's solicitor in a suit in Chancery, wrote and published in a newspaper anonymous letters, impeaching the novelty and usefulness of a patent claimed by the plaintiff, and the subject of the suit; it was ordered that the solicitor be committed for the contempt (*r*).

Addressing public meetings on the merits of a case.

Pending a trial at bar, for a misdemeanour, it is a contempt of court to hold public meetings for the purpose of addressing and appealing to the public upon the merits of the case: and especially where the speakers allege that the defendant is not guilty, that there is a conspiracy against him, and that he cannot have a fair trial. And the court will order the parties offending to appear in court to answer for their contempt; and will fine and imprison at the court's discretion (*s*). The court will discountenance any attempt to prejudice mankind against the merits of a case before it has been heard; and will protect every suitor against that which can affect the minds of persons who might be willing to give evidence, and which might prevent persons from so doing (*t*).

And the court will restrain by injunction a threatened contempt, as in a case where an advertisement had been published of an intention to preach a sermon on the subject-matter of a pending action (*u*).

Circular, libellous of partnership under administration by the Court.

Where, in a partnership action, a receiver and manager of the business had been appointed by the court pending further proceedings; a person, who had been a clerk in the firm,

(*p*) *In re Septimus Parsonage & Co.* (1901), 2 Ch. 424.

(*q*) *Tichborne v. Tichborne*, 39 L. J. Ch. 398; 18 W. R. 621; *Vernon v. Vernon*, 40 L. J. Ch. 118; 19 W. R. 404; *Buenos Ayres Gas Co. v. Wilde*, 29 W. R. 43.

(*r*) *Daw v. Eley*, 38 L. J. Ch. 113; 7 L. R. Eq. 49.

(*s*) *Reg. v. Castro and others*, L. R. 9 Q. B. 219; *S. C. nom. Reg. v. Onslow and Whalley*, and *Reg. v. Skipworth*, 12 Cox, C. C. 358, 371.

(*t*) *Tichborne v. Mostyn*, 15 W. R. 1072; L. R. 7 Eq. 55 (n. 1).

(*u*) *Mackett v. The Commissioners of Herne Bay*, 24 W. R. 845. Bacon, V.-C.

issued a circular to the customers, containing a report of the proceedings by the court, with statements conveying an inference that the partnership business was in a failing condition, and soliciting their custom on his own account; the circular was held to be a contempt of court, by interference with the administration of justice, and a libel on the partnership business (*x*). CHAP. XXVII.

Any act having a tendency to produce false evidence; or to cast reproach on the administration of justice, may be a contempt of court, as by the publication of an advertisement offering a reward of £100, &c., to anyone who would discover and make legal proof of a certain marriage, which marriage had been previously adjudged good in the Spiritual Court, and also in the Court of Delegates, and a verdict given at the bar of the Court of Common Pleas in its favour (*y*). Advertisements offering rewards for evidence:

But where, pending an appeal from a judgment, pronouncing in favour of the validity of a patent owned by the plaintiffs, advertisements were published, at the instigation of the defendants, in a newspaper—one asking for funds to carry on the appeal, on the ground that one was a test action, in which the trade generally were interested; and the other offering a reward of £100 for certain documentary evidence; a motion to commit the printers and publishers of the newspaper for contempt of court was dismissed, with costs (*z*).

Where a co-respondent, on being served with a citation in a suit for dissolution of marriage on the ground of his alleged adultery with the petitioner's wife, published, in the local newspapers, a notice by way of advertisement, denying the charges and offering a reward of 100 guineas for such information as would lead to the discovery and conviction of the instigator of such charges; it was held, that the co-respondent had been guilty of a flagrant contempt of court (*a*). By Co-respondent in Divorce, denying charges and offering reward for evidence:

And where a husband, against whom a petition for dissolution of marriage had been filed, circulated handbills offering a reward for evidence of adultery against the petitioner; the court issued an attachment against the respondent for contempt of court (*b*). The like by respondent.

Where after the trial and conviction of a prisoner, at Abusing and threatening one of the jury.

(*x*) *Helmors v. Smith* (No. 2), 35 406.
Ch. D. 449; 56 L. J. 145.

(*y*) *Pool v. Sucherel*, 1 P. Wms. 675.

(*z*) *The Plating Company (Ltd.) v. Farquharson*, 17 Ch. D. 49; 50 L. J.

(*a*) *Brodrigg v. Brodrigg and another*, 11 P. D. 66; 55 L. J. 47.

(*b*) *Butler v. Butler*, 13 P. D. 73; 57 L. J. 42, per Butt, J.

CHAP. XXVII. Assizes in Dublin, his brother went to the house of the foreman of the jury, and accused him of having bullied the jury into finding the prisoner guilty, and challenged him to mortal combat; this was held a high contempt of the court before which the trial was had, but the defendant having apologised to the court, and expressed his regret, he was sentenced to imprisonment for one month only, and to enter into recognizances to keep the peace for seven years (c).

Contempts by disobedience to Orders of Court.

CLASS 3.—*Contempts by disobedience to the lawful judgments, decrees or orders of the court.*

Disobedience to an order of the Court is treated as a contempt of court, not so much on the ground that the dignity of the court has been insulted but because its authority has been set at naught and an obstruction caused to the administration of justice.

And accordingly it has been repeatedly held, that any wilful disobedience to a rule or order of the court, is a contempt for which an attachment may issue (d). And in those cases where an attachment would not be an appropriate remedy, the court may fine or imprison, at its discretion.

Order prohibiting report of trial.

And where an order was made and promulgated by a court of general gaol delivery, prohibiting the publication of the proceedings of the court on the trial of one Thistlewood for high treason, until the whole of the trials of the other prisoners indicted with him for the same offence should be concluded; it was held, that a breach of the order was a contempt of court, punishable by fine or imprisonment (e).

Proceedings in camera.

It is a contempt of court to publish a report of proceedings heard *in camera* (f).

Defiant disobedience to Order of Court.

And where a party to a petition in court, upon which judgment had just been given, which judgment was then about to be written upon it, seized hold of the document saying: "I withdraw the petition": whereupon he was informed that the petition could not be withdrawn, and he was ordered to restore it, but he persistently took it away, and on an officer of the court being sent to get it back or to imprison the petitioner, he

(c) *Reg. v. Martin*, 5 Cox, C. C. 356, cor. Pigot, C.B., and Pennefather, B.

(d) Vin. Abr. Contempt, 447; 3 Chanc. Rep. 41; Cary's Rep. 54, 75, 82, 83; 1 Salk. 84; Cas. temp. Hardw.

p. 42. And see R. S. C., Ord. XLIV.

(e) *The King v. Clement*, 4 B. & Ald. 218; 11 Price, 68.

(f) *In re Martindale* (1894), 64 L. J. Ch. 9, per North, J.

threw the petition into the fire ; this was held to be a defiant CHAP. XXVII. disobedience to the order of the court, and a gross contempt, for which the offender was properly committed *instantly* to prison (g).

And where an injunction was granted restraining the defendants, who were trustees of a lodge, or branch, of a friendly society, from dividing a sum of £2,000, the assets of the lodge, amongst the members ; the defendants shortly afterwards retired, and new trustees were appointed, who (being aware of the injunction), under an order of the branch society, divided the money amongst the members, including the defendants. This was considered an attempt to evade the injunction, and a device for disobeying it ; and it was held, that the new trustees as well as the old, were guilty of contempt of court (h). Device to evade injunction.

And the court has jurisdiction to commit for contempt, a person who aids and abets a defendant in committing a breach of an injunction ; although such person be no party to the action and be not included in the terms of the injunction (i). Aiding and abetting a breach of an injunction.

In proceedings for contempt by breach of an injunction, or other order of the court, it must be shown that the injunction or order (as the case may be) has been brought to the notice of the alleged offender ; otherwise it will not be a proper case for committal for contempt (k). Scienter must be proved.

But where an action was brought for a libel contained in the recitals of a deed of settlement of a joint-stock company, it was agreed at the trial that the defendants should cancel the deed and prepare a new one ; and the terms of the agreement were embodied in an order of *nisi prius*, which was afterwards made a rule of court. It was held, that the defendants having shown themselves desirous of obeying the order *bonâ fide*, but unable to do so, were not liable to an attachment (l). So also where the appellant had been required by *subpœna* to bring into and leave in the Probate Registry a certain script alleged to be, but not in fact, in his possession or control ; this was held to be no contempt ; and the fact of his not having filed an affidavit Inability to comply with Order of Court.

(g) *Watt v. Ligertwood and another*, L. R. 2 Sc. App. H. L. 361 ; and *supra*, p. 399.

(h) *Arery v. Andrews*, 51 L. J. Ch. 414 ; 30 W. R. 564.

(i) *Seaward v. Paterson*, C. A. (1897),

1 Ch. 545.

(k) *Metropolitan Music Hall Co. v. Lake and others*, 58 L. J. Ch. 513, per Chitty, J.

(l) *Clare v. Blakesley and others*, 8 Dowl. 835.

CHAP. XXVII. explaining the reason of his non-compliance, did not give the court jurisdiction to order him to pay costs (*m*).

Contempts as
to infant
wards of
Court.

Marrying an infant ward of court without the consent or authority of the court, is a contempt; though the parties concerned in such marriage had no notice that the infant was a ward of the court (*n*). And encouraging an infant ward of court to go from his committees, under whose care the court had placed him, is a contempt (*o*).

Clandestine
removal of
ward.

The clandestine removal of a ward of court from the custody of the person with whom such ward has been residing under the authority of the court, is in its nature a criminal contempt; and a member of the House of Commons who had so acted, and who on being personally examined by the court, admitted the fact and refused to state the present residence of the ward (his own daughter), was committed to the Fleet; although he was not a party to the suit (*p*).

Disobedience
to Orders of
County Court.

A County Court has power to commit for disobedience to its orders, whether interlocutory or final (*q*). But if a judge of a County Court commit for contempt for disobedience to an order of the Court, in a matter as to which the judge had no jurisdiction, he will be liable to an action of trespass (*r*).

Contempts by
other acts
tending to
obstruct the
course of
justice.

CLASS 4.—*Contempts by other acts tending to prejudice or obstruct the course of justice.*

The same general principle which pervades the whole current of decisions as to contempts of court, applies also to those of the class above mentioned, viz., that the jurisdiction is founded on the wrongful interference with the administration of justice.

Offences of the class here indicated are sometimes of a very subtle and dangerous tendency, requiring the most prompt and public example; since nothing can be more calculated to shake the confidence of the people in the purity of the administration of justice than a tribunal (whether it be judge or jury) that has been, or that is capable of being, intimidated or influenced even in the smallest degree, by any kind of threat, bribe, overture, or other improper suggestion. And it is besides, of primary

(*m*) *In re Emmerson, Rawlings v. Emmerson*, 57 L. J. P. D. 1.

(*n*) *Herbert's case*, 3 P. Wms. Rep. 116.

(*o*) 1 P. Wms. 697, cited as *Dr.*

Yalden's case.

(*p*) *Long Wellesley's case*, 2 Russ. & Myl. 639. *Vide* 2 St. Tr. (N.S.) 912.

(*q*) *Supra*, p. 394.

(*r*) *Houlden v. Smith*, 14 Q. B. 841.

importance to the constitution, and the well-being of society, CHAP. XXVII.
that the course of justice should be pure and unbiassed; and
that suitors and others should be enabled to approach the
throne of justice with confidence in its integrity and a full
assurance of its absolute impartiality.

And therefore, all acts tending to intimidate or to unduly
influence persons concerned in the administration of justice;
and all writings, letters, or publications, which have for their
object to pervert, or to obstruct, the ordinary course of justice,
are contempts of court (s).

Nothing can be of greater necessity to the proper administra-
tion of the law, than to keep the streams of justice clear and
pure, that parties may proceed with safety to themselves and
their characters. "A greater offence than a person's attempt
by private communication, without the knowledge of those to
whom he is opposed, to influence, by private feelings, the con-
duct of any one invested with the duty of judicially disposing
of matters pending in court, cannot well be stated" (t).

Offering a
bribe to the
Judge, or
otherwise
endeavouring
to obtain
undue in-
fluence.

And where the Mayor of Yarmouth wrote a letter to
Lord Hardwicke, C., mentioning that a bill in Chancery was
threatened to be filed against him, and enclosing a bank-note
for £20, of which he desired his lordship's acceptance; he was
ordered to show cause why he should not be committed for
contempt of court; and afterwards, in consideration of his sub-
mission to the court, and asking pardon, and of his being at
the time Mayor of Yarmouth; and on showing cause it appearing
that the public business and affairs of the Corporation might
suffer by his imprisonment, he was discharged upon payment
of costs; and the bank-note was ordered to be applied to the
relief of prisoners in the Fleet (u).

Every insult offered to a judge, in the exercise of the duties
of his office, is a contempt; but when the writing or publi-
cation proceeds further, and when, not by inference, but by
plain and direct language a threat is used, the object of which
is to induce a judicial officer to depart from the course of his
judicial duty, and to adopt a course he would not otherwise
pursue, it is a contempt of the very highest order (x).

Threatening a
Judicial
Officer.

Anyone who uses violent and abusive language to an officer
of the court in the execution of the duties of his office;—as

Abusing or
assaulting
inferior Officers
of the Court.

(s) *Vide Ex parte Jones*, 13 Ves. 237. 674. See also *McGill's case*, 2 Fow.

(t) *Lechmere Charlton's case*, 2 Myl. Ex. Prac. 404.
& Cr. 353, per Lord Cottenham, C. (x) *Lechmere Charlton's case*, 2 Myl.

(u) *Martin's case*, 2 Russ. & Myl. & Cr. 339, per Lord Cottenham, C.

CHAP. XXVII. when serving the process or orders of the court ;—or who uses scandalous or contemptuous words against the court, or the process thereof, is liable to be committed for contempt of court (*y*). So also, for assaulting the deputy messenger to the great seal, in the execution of the duties of his office (*z*). And obstructing a messenger or officer of the court in the execution of a warrant or order of the court, is a contempt (*a*). And so also, abusing, insulting, and challenging to fight, one of the jury for finding a prisoner guilty (*b*).

Abusing and threatening a solicitor.

Abusing, accusing of perjury, and threatening a solicitor, within the precincts of the court, with reference to an order made by a judge at chambers in a judicial proceeding, is a gross contempt of court (*c*).

Attempts to intimidate parties to judicial proceedings.

And where threats are used against parties to proceedings before the court, with the object of intimidating them in the conduct of their suit, such are contempts of court; whether they have the effect intended or not. The offence is complete the moment after the threat is used (*d*).

Threatening a prosecutor.

So, an attachment was granted against a defendant for threatening the life of the prosecutor, who had indicted another for perjury contained in an affidavit on which an information had been issued against him (*e*).

Threat by plaintiff to defendant.

A threatening letter sent by the plaintiff to the defendant, pending the suit, with a view to intimidate him in the conduct of his defence, is a contempt, upon which to found an order for committal (*f*).

Threatening a petitioner in a Divorce Suit.

And so also, threatening a petitioner in a divorce suit, to publish concerning him, a statement of facts unless he withdraws his petition, is a contempt of court (*g*).

Threatening a witness.

And where the respondent in a suit in the Divorce Court, some time before the hearing, threatened to prosecute a witness for perjury, with reference to certain evidence he had reason to suppose such witness would give in the suit; and had also

(*y*) *Barker v. Shepherd*, Toth. 167; *Rex v. Jones*, 1 Str. 185; *Williams v. Johns*, 2 Dick. 471; 1 Mer. 303, n. (*d*); *Price v. Hutchinson*, L. R. 9 Eq. 534.

(*z*) *Elliott v. Halmarack*, 1 Mer. 302.

(*a*) *Ex parte Titner*, 1 Atk. 136; *Ex parte Dixon*, 8 Ves. 104; *Ex parte Page*, 1 Rose, B. C. 1.

(*b*) *Reg. v. Martin*, *supra*, p. 408.

(*c*) *In re Johnson*, 20 Q. B. D. 68; 57 L. J. 1; and *supra*, p. 391.

(*d*) *Bromilow v. Phillips*, 40 W. R. 220; and see *Welby v. Still*, 66 L. T. 523.

(*e*) *Rex v. Carroll*, 1 Wils. 75.

(*f*) *Smith v. Lakeman*, 26 L. J. Ch. 305; and see as to a threat by defendant to plaintiff, *Kitcat v. Sharp*, *supra*, p. 405.

(*g*) *In re Mulock*, 33 L. J. P. & M. 205; 3 S. & T. 599.

written abusive letters to her; such were held contempts of court (h). CHAP. XXVII.

It is also a gross contempt, and interference with the fair trial of an action, to tamper with a witness by the offer of money to induce such witness to go out of the way to some place where she could not be found (i). Tampering with a Witness.

And for terrifying a witness who was about to be examined on a commission, the offender was committed for contempt of court (k).

It appears from these and various other authorities, that it is immaterial what measures are adopted, if the object be to taint the source or to pervert the course of justice; and to obtain by corrupt or improper means, a result of legal proceedings different to that which would follow in the ordinary course. Result of authorities.

CHAPTER XXVIII.

AS TO THE PROCEDURE AGAINST OFFENDERS FOR CONTEMPTS OF COURT.

<i>The procedure against offenders for Contempts.</i>	<i>Proceedings by attachment for Contempt.</i>
<i>Summary process.</i>	<i>Contempt, how cleared.</i>
<i>Contempts committed in the face of the Court.</i>	<i>Where the application for attachment is on the Civil side.</i>
<i>Proceedings by the Court itself as to.</i>	<i>Crown Office Rules as to Contempts.</i>
<i>No Appeal from adjudication for Contempt.</i>	<i>Punishment for Contempt.</i>
<i>Motion to commit for Contempt.</i>	<i>Proceedings by Indictment, and by Criminal Information for Contempt.</i>
<i>Caution to be exercised as to committal.</i>	<i>Proceedings of Colonial Courts as to Contempts.</i>
<i>Costs in proceedings as to Contempts.</i>	

In the preceding chapter the jurisdiction of the various courts, as to their power to punish contempts of court, having been discussed in detail, and the different kinds of contempt classified and arranged under suitable heads or divisions, it will now be necessary to explain the procedure against offenders for contempts.

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- (h) *Shaw v. Shaw*, 31 L. J. P. & M. 527, per Kay, J.
 35; 2 S. & T. 517. (k) *Partridge v. Partridge*, Vin. Abr. Contempt, A. 25.
 (i) *Lewis v. James*, 3 Times L. R.

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The procedure
against
Offenders for
Contempts.

The modes of procedure against offenders for contempts of court are various, depending in some respects on the class and nature of the offence ; and are either—

1. By summary process,—as by the immediate apprehension of the offender ; or by ordering him to attend the court and answer his contempt ; and by the imposition of a fine, or commitment to prison, or both.

2. By motion to the court to commit.

3. By attachment.

4. By indictment ; and in some cases—

5. By criminal information.

It should be observed, that contempt of court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated ; and an opportunity given him of answering it (*a*). And this applies to every mode of procedure against offenders for contempt.

Summary
process.

1. *The summary process* is in general founded upon contemptuous language and reflections applied to those who preside in courts of justice, and to their proceedings ; and such contempts are either direct—as where a judge or magistrate is openly insulted in the execution of his office ; or consequential,—where the offender, by speaking or writing contemptuously of the court, or its judges in their judicial capacity, reflects upon the authority by which they were appointed, and creates a prejudice against the administration of justice.

Contempts
committed in
the face of the
Court.

Where the insult is offered in the face of the court by the use of contumelious language, demonstrating the want of that respect and regard which is essential to the preservation of its authority, the offender may be instantly apprehended, fined, or imprisoned, at the discretion of the judge, without further examination (*b*). This doctrine appears to extend to all cases where contemptuous words are spoken in the presence of a magistrate in the actual discharge of his duty (*c*). And though the magistrate may elect to proceed in this summary mode, yet if he does not, the offender is liable to an indictment ; since, wherever a justice may commit for a contempt, the party may be indicted for the misdemeanour (*d*).

(*a*) *In re Pollard*, L. R. 2 P. C. 106.

(*b*) Cro. Eliz. 23 ; 2 Roll. Ab. 78 ;
4 Blac. Com. 286 ; Staunf. P. C. 13 *b* ;
and see *Yates v. Lansing*, 5 Johns.
Amer. Rep. 282 ; and S. C. in Court of

Error, *Ibid.*, vol. 9, p. 395.

(*c*) 1 Str. 420 ; Salk. 697 ; 3 Mod.
139 ; 1 Bulst. 139, 140.

(*d*) 1 Str. 420.

A defendant who is conducting his own defence before the court and a jury, on his trial for the publication of a blasphemous libel, may be fined for contempt of court, in persisting—after admonition and warning by the judge—in reviling the Christian religion (*e*). So also for persistently attacking the characters of persons not before the court (*f*). And for contemptuous expressions to the presiding judge, on being warned that if he persisted in such conduct he should feel compelled to restrain him; to which the defendant replied—“My Lord, if you have your dungeon ready, I will give you the key” (*g*).

And so also it has been held by the House of Lords, in a Scottish case, that when a judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of court (*h*). And where a defendant on his trial for an assault, made use of violent expressions towards the prosecutor, the court ordered and adjudged him to find sureties for his good behaviour for two years, and to be imprisoned till such security given (*i*).

When the court itself takes notice of the contempt, the offending party will be ordered to personally attend the court and show cause why he should not be committed (*k*).

But when it appears that the party in contempt has been before a court of competent jurisdiction, which court has fined or committed him for a contempt, it is not competent to any other court to enter at all into the subject-matter (*l*).

The court is the judge as to whether or not it has been treated with contempt. And there is no appeal against the decision of the court adjudging an offender guilty of a contempt committed in the face of the court; unless the court so adjudicating acted beyond its jurisdiction (*m*).

But it seems that where the jurisdiction of the court is challenged, an appeal will lie; as in a case where a vacation

Defiant disobedience to Judge.

Proceedings by the Court itself.

Where the Jurisdiction is challenged.

(*e*) *The King v. Davison*, 4 B. & Ald. 329. *supra*.

(*f*) *Ibid.*

(*g*) *Ibid.*, p. 330.

(*h*) *Watt v. Ligertwood and another*, L. R. 2 Sc. Ap. (H. L.) 361.

(*i*) *Rev v. Mahon*, 4 A. & E. 576.

(*k*) *Martin's case*, 2 Russ. & Myl. 674, n. (*a*); *Re McGill*, 2 Fow. Ex. Pr. 404; *Lechmere Charlton's case*, *supra*; *In re The Sheriff of Surrey*,

supra; *Reg. v. Castro, Skipworth and others*, *supra*.

(*l*) *Vide Carus Wilson's case*, 7 Q. B. 1008; see also *Ex parte Fernandez*, *supra*, p. 400. *O'Shea v. O'Shea and another*, *In re Tuohy*, 15 P. D. 59; 59 L. J. P. 47.

(*m*) *Vide Ex parte Pater*, 5 B. & S. 299; *Reg. v. Jordan*, 36 W. R. 797; *S. C. Reg. v. C. C. Judge of Stafford*, 57 L. J. Q. B. D. 483.

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- judge made an order of committal for a contempt committed within the precincts of the court (*n*).
- Appeal against refusal to commit :** An appeal will lie from the refusal by a judge of first instance, to commit for contempt by disobedience to an order of court (*o*). So also where an order for costs comes in the place of an order for committal, the order may be appealed from, though it be an order to pay costs only (*p*).
- Against Order to pay Costs.**
- Warrant of commitment by Judge of Superior Court.** The warrant of commitment for contempt, by a judge of a superior court, may be general in its terms (*q*); though the contempt be committed by a witness, or party in a cause, whether civil or criminal, during the trial; and his decision is not subject to review by a court of appeal (*r*). And a sentence to pay a fine and to be imprisoned during the pleasure of the court; and in addition to be imprisoned until such fine is paid, is in accordance with law (*s*).
- General committal for Contempt.**
- Commitments by Justices of the Peace for Contempt.** But a commitment by Justices of the Peace for contempt must be for a time certain; and must contain a proper adjudication of the contempt. Where, by the warrant, the defendant was committed "until he should be discharged by due course of law," the warrant was held bad (*t*).
- By Motion to commit for Contempt.** 2. *By motion* to the court to commit for contempt; by the Crown Office Rules, 1906, Order LII. of the R. S. C. is to apply to all proceedings on the Crown side, except as regards attachment.
- Where the contempt is not offered immediately in the face of the court, but consists in the improper publication of its proceedings *pendente lite*, or of comments upon such proceedings, or reflections upon parties thereto; the effect of which may be to create prejudice or partiality, and thereby to interfere with the fair administration of justice; the course of proceeding is usually, by motion to commit the offender for his contempt. Such motion may be *ex parte* for an order absolute where the contempt is of a very flagrant nature: but where the application is on the civil side, it must be made on notice of motion (*u*): service of which must usually be personal (*x*).
- (*n*) *In re Johnson*, 20 Q. B. D. 68; 57 L. J. 1. *re McAleece*, Ir. R. 7 C. L. 146.
- (*o*) *Jarmain v. Chatterton*, 20 Ch. D. 493; 51 L. J. 471. (*s*) *In re Moseley*, 62 L. J. P. C. C. 79.
- (*p*) *Witt v. Corcoran*, 2 Ch. D. 69; 45 L. J. 603; and see *In re Clements v. Erlanger*, 46 L. J. Ch. 375. (*t*) *Rex v. James*, 5 B. & Ald. 894; *Prickett v. Gratrez*, *supra*, p. 395; *Green v. Elgie and another*, 5 Q. B. 99; and see *In re Cobbett*, 7 Q. B. 187.
- (*q*) *In re Cobbett*, 7 Q. B. 187. (*u*) *Vide* R. S. C., Ord. LII. r. 3.
- (*r*) *Ex parte Fernandez*, 6 H. & N. 717; 10 C. B. (N. S.) 3; and see *In* (*x*) *Hope v Hope*, W. N. (1868) 295.

If, however, personal service cannot be effected, the court will, in a proper case, give leave to serve the notice of motion by registered letter (*y*). And where the application is against one of the parties to the litigation, and there is a difficulty in effecting personal service, the notice of motion may be served on the party's solicitor (*z*).

Where the alleged contempt is by an incorporated company, the application should be by motion to attend and answer for the alleged contempt (*a*).

The court will not encourage motions to commit for contempt, where there is no real cause for committal, and only an apology and costs are asked for (*b*). It is competent for the court, where a contempt is threatened or has been committed by the publication of *ex parte* statements pending the trial of an action, to take the more lenient course of granting an injunction, in preference to making an order for committal or sequestration (*c*).

The jurisdiction of committing for contempt being practically arbitrary and unlimited, a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted (*d*).

Caution to be
exercised as to
committal.

Although it may be a contempt of court if, pending the hearing of a cause, observations of *any* kind are published tending to prejudice the minds of the public against any of the parties to the cause, yet if the offence complained of be not of so serious a nature as to render necessary the exercise of the summary jurisdiction of the court, by committal to prison, an application of the kind ought not to be made: and if made where the offence is of a trivial nature (although amounting technically to a contempt of court), it will be dismissed (*e*). To justify an order for committal it must be shown that the publications complained of would, on the face of them, convey to the mind of a person of ordinary intelligence that they tend to interfere with the administration of justice (*f*). And accord-

(*y*) *Vide In re Johnson*, 57 L. J. Q. B. D. 1.

(*z*) *Browning v. Sabin*, 5 Ch. D. 511; 46 L. J. 728.

(*a*) *The King v. Freeman's Journal* (1902), 2 Ir. Rep. K. B. 82.

(*b*) *The Plating Co. v. Farquharson*, 17 Ch. D. 50; 50 L. J. 406.

(*c*) *Coats v. Chadwick* (1894), 1 Ch. 347; 63 L. J. 329.

(*d*) *In re Clements v. Erlanger*, 46 L. J. Ch. D. 383, per Sir George Jessel, M.R.

(*e*) *Hunt v. Clarke, In re O'Malley*, 37 W. R. 724; 58 L. J. Q. B. D. 490; *Cheshire v. Strauss, In re O'Connor*, 12 Times L. R. 291.

(*f*) *The Plating Co., Ltd. v. Farquharson, supra*.

CHAPTER
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restrain
publications
pendente lite.

ingly, where comments have been made in a newspaper on a criminal case then awaiting trial, the court will not exercise its power of committal unless it be clearly shown that such comments were intended to, or were undoubtedly calculated to prejudice the fair trial of the case (*g*).

If on the hearing of the motion the court should come to the conclusion that no sufficient case is made out for a committal, but that the further publication of the matters complained of should be restrained *pendente lite*; then, if an injunction is asked for, the court has the power so to restrain the further publication thereof; but will use its discretion as to granting an injunction (*h*). Pending litigation, the court will restrain the publication by any of the parties to the suit, of *ex parte* garbled statements (calculated to prejudice the case of their opponents) of any of the proceedings in court, or before the examiner. And although the circumstance that such publication is by way of defence, and in answer to similar publications by the other side, may palliate the offence, it will not prevent the court from granting the injunction (*i*). In these cases the party complaining should apply promptly, or he may not be entitled to redress; nor will he if he has himself submitted to or entered upon a public discussion of the matter in a newspaper (*k*).

To restrain
threatened
publication.

An injunction was granted, on motion, to restrain a party to an action from a threatened publication of circulars, abusive of a party to, and tending to prejudice the fair trial of, the action (*l*). So also to restrain a threatened contempt, by the preaching of a sermon on the subject-matter of a pending action (*m*).

Costs, in Pro-
ceedings as to
Contempts.

In all cases in which proceedings are taken by motion to the court to commit, the court on adjudging the offender guilty of the contempt, has power to order him to pay the costs of the proceedings (*n*); though in some cases, as for instance, where there are extenuating circumstances, the power will not be exercised (*o*).

(*g*) *The Queen v. Payne and another* (1896), 1 Q. B. 577; 65 L. J. 426.

(*h*) *Brook v. Evans*, 29 L. J. Ch. 616; 8 W. R. 688; *Bowden v. Russell*, 46 L. J. Ch. 414.

(*i*) *Coleman v. West Hartlepool Ry. Co.*, 8 W. R. 734; and see *Ex parte Jones*, 13 Ves. 237.

(*k*) *Daw v. Eley*, 38 L. J. Ch. 113.

(*l*) *Kitcat v. Sharp*, 52 L. J. Ch.

134; *Coats v. Chadwick* (1894), 1 Ch. 347.

(*m*) *Mackett v. Commissioners Herne Bay*, *supra*, p. 406.

(*n*) *Martin's case*, 2 Russ. & Myl. 674; *Shaw v. Shaw*, 31 L. J. (Pro. & Mat. Ca.) 35; *Little v. Thomson*, 2 Beav. 129; *Daw v. Eley*, 38 L. J. Ch. 113; *In re Bryant*, 4 Ch. D. 98.

(*o*) *Vernon v. Vernon*, 40 L. J. Ch.

3. *By Attachment.*—The proceeding by writ of attachment whereby a person may be arrested for contempt of court, was originally instituted for the benefit of the subject: it was established to enforce obedience to the commands of courts of justice. CHAPTER XXVIII.
—
Proceedings by attachment for Contempt.

Attachments were granted where there had been a resistance of process, or a contumelious treatment of it; or any violence or abuse of the ministers or others employed to execute it; also for any wilful disobedience to, or non-compliance with, an order of court. The principle upon which they were granted in respect of contempts of bailiffs and other officers of the court, was to facilitate the execution of the law, by giving a summary and immediate redress and protection to persons undertaking the service and execution of the process of the court. And the law considers it a contempt of the authority of the court, to abuse and vilify the person who is acting under its authority.

The proceeding by Attachment, is a process from a Court of Record, awarded by the judges at their discretion; upon a suggestion, or upon their own knowledge, against a person guilty of a contempt punishable in a summary manner (*p*): and although less seldom resorted to than formerly, is still available.

The modern practice however, seems to be preferred, by Motion to the Court on the Crown side for an Order Nisi, directing the accused to appear on a day named to show cause why he should not be committed to prison for his contempt (*q*). Application for, how made on the Crown side.

If the party fail to appear and show cause, a warrant may be issued for his apprehension (*r*).

Where the proprietor of a newspaper was guilty of a contempt, in publishing the proceedings of a court of gaol-delivery, contrary to the order of the court; the court, on affidavit of the fact, and after an affidavit of notice to the party having been served at the office at which the newspaper was published, requiring him to appear before the court to answer the contempt on a day specified; and default made in appearance; imposed a fine of £500 in his absence; and the Court of King's Party in Contempt failing to appear may be fined in his absence.

118; 19 W. R. 404; and see *The Plating Co. v. Farquharson*, *supra*; *The Queen v. Parnell*, 14 Cox, C. C. 474.

(*p*) 2 Haw. P. C. c. 22, "Attachment"; 1 Wils. 299, 300.

(*q*) *Vide The Queen v. Gray* (1900),

2 Q. B. 36; and *vide* also R. S. C., Ord. XLIV., rr. 1 and 2; and *vide* also "Attachment for Contempt"; Cr. Off. Rules (1906), Nos. 240-242.

(*r*) *Lechmere Charlton's case*, 2 Myl. & Cr. 316.

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Bench, holding the proceeding to be regular, afterwards refused a *certiorari* to bring up the proceedings into the court (s).

Contemptuous
disregard of
rule of Court.

Where a rule was obtained to show cause why an information should not be granted, the defendant, on being served with the rule, showed his disregard of it in very contemptuous language (t). Upon a motion for an attachment, grounded upon this contempt, Northey, attorney-general, insisted that the defendant ought first to be heard to show cause against it; but the court said, "He shall answer it in custody, for it is to no purpose to serve him with a second rule who has slighted and despised the first; it would be to expose the court to further contempt."

The use of abusive expressions and threatening gestures towards a solicitor, after the hearing of an application at chambers, is a contempt of court punishable by attachment (u).

Where criminal informations had been exhibited by the Attorney-General for Ireland, against certain persons for conspiracy in inciting tenants not to pay rent, and in inciting persons not to deal with tenants who had paid rents; an attachment was issued against the proprietor of a newspaper for having published articles calculated to prejudice the fair trial of the accused (x).

The merits of
Case for trial
cannot be
discussed on
showing cause.

When a defendant, in a pending trial, seeks the protection of the court against publications in a newspaper, calculated to prejudice his fair trial; the court will not entertain, by way of answer to his application, any discussion upon the merits of the case for trial; nor its political or social importance, nor as to the truth of the prejudicial statements of which he complains. The sole question for the court is, the character and tendency of the publication (y).

Contempt, how
cleared.

In order to clear his contempt, the offending party must express his contrition, and submit himself to the court, or perform the act or obey the order (if any), the non-performance of, or disobedience to which has occasioned the contempt: he must also pay the costs (z). And where the contempt is one which tends to obstruct or prejudice the course of justice, in proceedings pending before the court, the party in contempt

(s) *The King v. Clement*, 4 B. & Ald. 218; 11 Price, 68.

(t) 1 Salk. 84; Vin. Abr. Contempt, 449; and see 3 Chancery Rep. 41.

(u) *In re Johnson*, 20 Q. B. D. 68; 57 L. J. 1.

(x) *The Queen v. Parnell and others*, 14 Cox, C. C. 474.

(y) *Ibid.*

(z) *Cann v. Cann*, 3 Hare, 333.

n. (a).

will sometimes be required, as a condition precedent to his discharge, to apologise, not only to the court itself, but also to the persons whose honour or character he may have aspersed (a).

All contempts of court must be answered in person, and not by attorney (b). For although counsel will be heard in behalf of a person in contempt, the personal attendance of the party will not usually be dispensed with. But where it would be inconvenient to bring up a person committed for contempt, the court may, in its discretion, dispense with his personal attendance (c).

Contempts must be answered in person.

A party who is in contempt for non-compliance with an order of the court cannot be heard, except for the purpose of purging the contempt (d). But a defendant cannot object to a cause being heard, on the ground that the plaintiff is in contempt (e).

The punishment for contempt of court is fine or imprisonment, or both. An offender may also be required to find sureties for his good behaviour. The law does not impose any restriction upon the superior courts in the amount of the fine, nor any limit to the duration of the punishment, both being in the discretion of the court. But as to inferior courts, their decisions are subject to review by a superior court.

Punishment for Contempt.

A superior court may also require an offender to make an apology to the court; to obey the judgment or order of the court; and in default to be imprisoned until he obey the same (f).

An offender in contempt cannot, since the Debtors' Act, 1869, be detained in prison for non-payment of the costs of the contempt (g). Yet the court in ordering his discharge will make it part of the order, that he do pay the costs of his contempt and of the motion to discharge him (h). And where a prisoner was released upon the undertaking of his solicitors to pay the costs of the application for attachment, such undertaking was enforced by the court (i).

(a) *Ex parte Turner and another, In re Martin*, 3 Mont. D. & De G. 523; *Felkin v. Lord Herbert*, 10 Jur. N. S. 452; 12 W. R. 241.

(b) Br. Contempts, pl. 15, cit. 22 E. IV. 33, 34; and see *Ex parte Martins*, 9 Dowl. P. C. 194.

(c) See per Erle, J., in *Crawford's case*, 13 Q. B. 618.

(d) *Garstin v. De Garston*, 34 L. J. P. D. & A. 45; 4 S. & T. 73.

(e) *Ricketts v. Mornington*, 7 Sim. 200.

(f) See *Carus Wilson's case*, 7 Q. B. 986; *Ex parte Turner and another, In re Martin, supra*; *Felkin v. Herbert, supra*.

(g) *Jackson v. Mawby*, 1 Ch. D. 86; 45 L. J. 53.

(h) *Ibid.*; and see *Micklethwaite v. Fletcher*, 27 W. R. 793.

(i) *In re Woodfin*, 30 W. R. 422.

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XXVIII.Discharge of
prisoner.

Where the term of imprisonment is not stated in the commitment, or is not notified in the writ of attachment, an application for discharge must be made to the court. The application is now usually made by motion (*k*), formerly it was by petition (*l*). A motion to discharge a prisoner from custody has priority over all other motions (*m*).

Where a person is in contempt for having disobeyed an order of court to pay over money received by him as trustee, and the writ of attachment under which he is committed to prison contains (as now usual) a note at the foot, to the effect that under the provisions of the Debtors' Act no person shall be imprisoned for disobeying a judgment or order for payment of money or costs for a longer period than one year, at the end of a year's imprisonment it is the duty of the sheriff to discharge him without applying to the court for an order of discharge (*n*). But in other cases where the term of imprisonment is not stated, an application for discharge must be made to the court in the usual way, either by the prisoner himself or by counsel in his behalf.

4 & 5. *By indictment; and by criminal information for contempt.*

Proceedings by
Indictment,
and Criminal
Information,
for Contempt.

In all cases in which a justice may commit an offender to prison for a contempt of court, such justice may, instead thereof, order the party to be *indicted* for the misdemeanour (*o*); and in some cases proceedings may be taken by criminal information; as, for instance, where the contempt consists in libellous reflections on the administration of justice (*p*).

When reflecting words are spoken of the judges of the Superior Courts, the speaker is indictable at Common Law, whether the words relate to their office or not. With respect to inferior magistrates, such as justices of the peace, it seems to be clear, on the authorities, that abusive and defamatory words spoken of them in their absence, and which do not relate to the execution of their office, are not indictable; even although the words affect them *generally* in their office, as where they impute want of ability, capacity, or integrity.

A criminal information was granted for calling a mayor "a puppy and a fool," the words being spoken of the mayor in his

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| (<i>k</i>) <i>Futroye v. Kennard</i> , 2 Giff. 110. | <i>wards</i> , 21 Ch. D. 230; 51 L. J. Ch. |
| (<i>l</i>) <i>See Nicholson v. Squire</i> , 16 Ves. | 943. |
| 260. | (<i>o</i>) Str. 420. |
| (<i>m</i>) <i>Ashton v. Shorroock</i> , 29 W. R. | (<i>p</i>) <i>Rex v. Watson and others</i> , 2 |
| 117. | T. R. 199; and see <i>Rex v. Salisbury</i> . |
| (<i>n</i>) <i>In re Edwards, Brooke v. Ed-</i> | 1 Ld. Ray. 341. |

magisterial capacity (*q*). But a criminal information will not be granted for words imputing malversation to a magistrate in his magisterial capacity, unless the words are uttered to or of him when in the actual execution of his office; or, unless they directly tend to a breach of the peace (*r*).

Proceedings of Colonial Courts as to contempts.—If a colonial court, in adjudicating upon a contempt, substitute an inappropriate mode of punishment for the offence, the order will be set aside on appeal to the judicial committee of Privy Council in England. So, where an order was made for suspending an attorney and barrister of the Supreme Court of Nova Scotia from practising in that court, for having addressed a letter in his capacity of a suitor, to the chief justice reflecting on the judges and the administration of justice in that court; on appeal to the judicial committee of Privy Council the order was discharged, on the ground that it substituted a penalty and mode of punishment which were not appropriate and fitting for the offence. The letter, although a contempt of court, and punishable by fine and imprisonment, was written by the appellant in his individual and private capacity as a suitor in respect of a supposed grievance, and had no connection with his professional character; it was therefore not competent for the Supreme Court to do more than award the customary punishment for contempt of court (*s*).

A judge of the Court of Queen's Bench in Lower Canada, whilst sitting alone in the exercise of the criminal jurisdiction, has, under the authority conferred upon him by the Consolidated Statutes of Canada, c. 77, s. 72, no power to pronounce a counsel in contempt for publishing letters reflecting upon the conduct of such judge, nor to impose a fine (*t*).

A contempt of court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering it. And so, in a case where a barrister engaged in his professional duty before the Supreme Court at Hong Kong, was, without notice of the alleged contempt, or rule to show cause, and without being heard in defence; by an order of

(*q*) *Ex parte The Mayor of Yarmouth*, 1 Cox, C. C. 122; and see *R. v. White*, 1 Camp. 359.

(*r*) *Ex parte The Duke of Marlborough*, 5 Q. B. 955; 1 Dav. & Mer. 720; and see *The Queen v. John Rea*, 17 Ir. C. L. R. 584.

(*s*) *Re Wallace*, L. R. 1 P. C. 283; *vide Re S. B. Surbadhicary*, *supra*, p. 397.

(*t*) *In re Ramsay*, 7 Moo. P. C. C. (N. S.) 263; L. R. 3 P. C. 427. See *Rainy v. The Justices of Sierra Leone*, 8 Moo. P. C. C. 47.

The Specific Contempt must be charged, and the accused heard in Defence.

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that court fined, and adjudged to have been guilty of several contempts of court during the conduct of a case, in disrespectfully addressing the chief justice, such order, upon a reference by the Crown to the judicial committee, under the statute 3 & 4 Wm. IV. c. 41, s. 4, was set aside, and the fine ordered to be remitted; first, on the ground that the order was bad, inasmuch as the offences charged were not of themselves such contempts of court as legally constituted an offence; and secondly, that even if they had been so, no distinct charge of the several alleged offences was stated, and no opportunity had been given to the party accused, of being heard before passing sentence (u).

Proceedings on
Appeal from
Colonial Court
to Privy
Council as to
adjudications
for Contempt.

Where the publisher of a colonial newspaper was committed to gaol for six months by colonial judges, for contempt of court in publishing two articles reflecting on one of the judges of the Supreme Civil Court of British Guiana; on petition to the Court of Privy Council in England, he was allowed to appeal, but without prejudice to the question whether there was a right of appeal or not (x). And upon argument afterwards of the preliminary question as to the right to appeal, it was held that the Supreme Court of Civil Justice in British Guiana was a court of record, and there being nothing on the face of the present proceeding as to the contempt or the punishment, which rendered it bad, the order for leave to appeal must be rescinded (y).

The judicial committee of the Privy Council have no jurisdiction to order the release of a person imprisoned for a contempt of the Supreme Court of Gibraltar, pending an appeal respecting the merits of a suit (z).

Innocent loan
of a Newspaper
containing
matter
scandalous of
the Court.

Where the appellant had been committed to prison for contempt of court, in lending a newspaper to a friend, containing matter scandalising the Court of the Colony of St. Vincent; it was held, that as he was neither printer nor publisher of the newspaper, nor the writer of the scandalous matter, but had innocently lent the paper containing it to a friend, without knowledge of its contents, he was neither constructively nor necessarily guilty of a contempt of court (a).

(u) *In re Pollard (App.) & The Chief Justice of Hong Kong (Resp.)*, L. R. 2 P. C. 106.

(x) *McDermott's case*, L. R. 1 P. C. 260.

(y) *Ibid.*, P. C., Dec. 1868, MS.;

38 L. J. P. C. C. 1.

(z) *Hughes v. Porral and others*, 4 Moore, P. C. C. 41.

(a) *McLeod (App.) & St. Aubyn (Resp.)*, (1899) A. C. 549.

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LIBELS AND CONTEMPTS OF PARLIAMENT, AND OTHER
LEGISLATIVE ASSEMBLIES.

<i>Libellous reflections on the Proceedings of Parliament.</i>	<i>for contempt.</i>
<i>Libels and Contempts of Members of Parliament.</i>	<i>Limit to time of Commitment by Parliament.</i>
<i>Jurisdiction of High Court of Justice as to.</i>	<i>Contempts of Colonial Legislative Assemblies.</i>
<i>House of Lords, jurisdiction to commit for contempt.</i>	<i>Distinction between power to punish for Contempt and power to remove for Disorderly Conduct.</i>
<i>House of Commons, power to commit</i>	

THE same policy which prohibits seditious comments on the King's conduct and Government extends to reflections on the proceedings of the two Houses of Parliament. These bodies, so essential a part of the constitution, are at all events entitled to reverence and respect, on account of the great and important public services which they are bound to discharge. They have exercised from very early times, the means of repressing immediate insults and contempts of their authority, which are essential at least to their dignity, if not to their very existence; nevertheless they have been sparing in the exercise of their extensive and apparently undefined powers, and have in many instances waived their privileges and delivered over offenders to be dealt with by the Common Law. It seems to have been the policy of the courts to encourage such a proceeding; and it is no less the duty of juries to pay a ready attention when proof of such insults is submitted to them.

A libel on the character of a member of Parliament in his office as such, is not only cognizable as a breach of the privileges of the House, but is also actionable at Common Law at the suit of the member so libelled.

And it is an undoubted contempt and breach of privilege to impute to any member of Parliament as such, that he takes bribes, preferments, place, or office, with a view to his particular vote or general conduct.

In the case of *The King v. Owen (a)* the defendant was tried

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Libellous
reflections on
the Proceedings
of Parliament,
how dealt
with.

Libels and
Contempts of
Members of
either House
of Parliament.

Jurisdiction of
High Court of
Justice as to

(a) Mich. 25 Geo. II. K. B. MSS. *The King v. Rayner*, 2 Barnard. K. B. 293, Digest Law of Libels, 125.

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Libels on
the Houses of
Parliament.

upon an information exhibited against him for publishing a malicious libel, entitled "The Case of the Honourable Alexander Murray, in an appeal to the people of Great Britain," etc., tending to scandalize and vilify the whole body of the Commons in Parliament assembled; to represent the proceedings in Parliament as cruel, arbitrary, and oppressive; to make it believed that the Commons in Parliament assembled had acted, in their legislative capacity, in open violation of the constitution; and also to represent the said House of Commons as a court of inquisition, etc., etc. Upon the publication of this alleged libel by the defendant, the Commons addressed the King, desiring his Majesty to give orders to prosecute the publisher; which was done (b).

After the impeachment of Mr. Hastings, a review of the articles of impeachment was published by John Stockdale. Upon the suggestion of Mr. Fox, one of the managers of the impeachment, the House unanimously voted an address to the King, praying his Majesty to direct his Attorney-General (c) to file an information against Mr. Stockdale, as the publisher of a libel upon the Commons.

Libels on
Peers, how
punished by
the House of
Lords.

Libels upon members of the House of Lords have, in earlier times, been visited with great severity. In later times offenders have been attached for libels on peers; so, in 1722, for printed libels on Lord Strafford and Lord Kinnoul: and in 1776 for sending an insulting letter to the Earl of Coventry (d).

House of Lords,
jurisdiction to
commit for
contempt.

Apart from the appellate jurisdiction of the House of Lords, the House itself has power in its judicial capacity to commit for contempt, though the jurisdiction was questioned in the case of the Earl of Shaftesbury in the year 1675 (e). And so also in the year 1779, in the case of Benjamin Flower, who had been committed to the prison of Newgate for having published a libel on the Bishop of Llandaff; but on being brought before the Court of King's Bench by writ of *habeas corpus*, that court held, that although the House of Lords, when exercising a legislative capacity, is not a court of record; yet, when sitting in a judicial capacity, as in the present case, it was a court of record: and no case being cited in which it had been held to be illegal in the House of Lords to fine and

(b) He was tried before Lee, C.J., and acquitted.

(c) Macdonald, afterwards Lord Chief Baron of the Court of Ex-

chequer.

(d) For other cases, *vide* May's Law and Usage of Parliament.

(e) *Vide* 6 How. St. Tr. 1269.

imprison a person guilty of a breach of privilege of the House. the court refused to discharge the defendant (*f*).

In 1834 the editor of the "Morning Post" was committed by the House of Lords to the custody of the Usher of the Black Rod, for a paragraph in that newspaper, reflecting upon the conduct of Lord Chancellor Brougham in the discharge of his judicial duties in the House of Lords (*g*).

The power of the House of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities on the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well-established precedents and authorities (*h*).

House of
Commons,
power to
commit for
contempt.

One of the most important privileges of the House of Commons is the privilege of committing for contempt; and incidental to that privilege is the right of the House to be themselves the judges of what is contempt, and to commit for that contempt by a warrant, stating generally that the commitment is for contempt of the House, without specifying what the character of the contempt is.

In the case of *Burdett (Bart.) v. Abbot* (*i*) it was held, on a consideration of all the authorities, that a commitment by the Speaker of the House of Commons, of the plaintiff, a member of the House, upon a resolution of the House that a printed paper, the printing of which had been authorised by the plaintiff, was a libel on the House, and that an order by the House that he should be committed on the Speaker's warrant was legal (*k*).

Libels upon members of the House of Commons have frequently been punished by the House with the committal to prison of the offender. There are also many cases (as already mentioned) in which the Attorney-General has been directed to prosecute offenders in the law courts. It was shortly after one of these prosecutions, in the year 1701, that the following resolution was entered on the journals of the House of Commons:—"That to print or publish any books or libels reflect-

(*f*) *The King v. Flower*, 8 T. R. 401, and in Ho. Lds. 5 Dow, 165. 314.

(*g*) Hans. Deb. 1834; 66 Lords' Journals, 701, 737, 743, 764.

(*h*) *Burdett v. Abbot*, 14 East, 1, 158; affirmed in Ex. Cham. 4 Taunt.

(*i*) 14 East, 1, *supra*.

(*k*) And see *Reg. v. The Sheriff of Middlesex*, 11 A. & E. 273; 8 Dowl. 451.

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ing upon the proceedings of the House of Commons, or any member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House of Commons" (l).

In 1790 a general resolution was passed by the House of Commons, "That it is against the law and usage of Parliament, and a high breach of the privilege of this House, to write or publish, or cause to be written or published, any scandalous and libellous reflection on the honour and justice of this House, in any of the impeachments or prosecutions in which it is engaged."

Among the most recent cases in which the power of the House has been exercised in that respect are the following:—In 1805 Peter Stuart was committed for printing, in his paper, libellous reflections on the character and conduct of the House. In 1810 Sir Francis Burdett, a member, was sent to the Tower for publishing "a libellous and scandalous paper, reflecting upon the just rights and privileges of the House." In 1819 Mr. Hobhouse, having acknowledged himself the author of a pamphlet which the House had previously declared to be "a scandalous libel, containing matter calculated to inflame the people into acts of violence against the legislature, and against this House in particular; and that it is a high contempt of the privileges, and of the constitutional authority of this House"; he was committed to the prison at Newgate (m). In 1821 the author of a paragraph in the "John Bull" newspaper, containing a false and scandalous libel on a member of the House, was committed to Newgate. In 1832 a firm of solicitors were summoned to the bar of the House of Commons, and admonished by the Speaker, for having addressed to a parliamentary committee sitting on a dock bill, a letter reflecting on the conduct of members of the committee, copies of which had been circulated in printed handbills (n). In 1838 complaint was made of certain defamatory expressions in a speech delivered by Mr. Daniel O'Connell, a member, at a public meeting, as containing imputations of perjury against certain members of the House in the discharge of their judicial duties in election committees. Mr. O'Connell was heard in his place in the House; and on acknowledging that he had used the expressions complained of, was declared guilty of a breach of

(l) Coms. Jour. 767.

420.

(m) *Hobhouse's case*, 3 B. & Ald.

(n) See Coms. Jour. 1821 and 1832.

privilege; and by order of the House was reprimanded in his place by the Speaker (o).

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And, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall, and every judge of all the courts, would be bound to discharge him by *habeas corpus* (p).

Limit to time
of Commitment
by Parliament.

When the House of Commons has committed any person for contempt, the propriety of such commitment cannot be questioned in any court of law, nor can it be inquired whether the person committed has been guilty of a contempt of the House. In such instances there is an adjudication of a court of competent authority in the particular case, and the court which is desired to interfere, not being a court of error or of appeal, cannot entertain the question whether the authority has been properly exercised (q).

The propriety
of Commitment
by Parliament
cannot be
questioned in
courts of law

A warrant of commitment for contempt, issued by the Speaker of the House of Commons, must be construed as a writ from a superior court, and not as a process issued by the magistrate of an inferior court (r).

The privilege enjoyed by the House of Commons of punishing for contempts, is one belonging to it by virtue of the *lex et consuetudo parliamenti*, which is a law peculiar to and inherent in both Houses of Parliament. But it is not to be inferred from the possession of those powers and privileges by virtue of that ancient usage and prescription, that the same or like powers belong to the legislative assemblies of recent creation in the dependencies of the Crown. The *lex et consuetudo parliamenti* applies exclusively to the House of Lords and House of Commons in England, and is not conferred upon a supreme legislative assembly of a colony or settlement by the introduction of the common law of England into the colony. No distinction in this respect exists between colonial legislative councils and assemblies, whose power is derived by grant from the Crown,

Contempts of
Colonial Legis-
lative Assem-
blies.

(o) Ho. Com. Jour. 1838. For other cases of more recent date, *vide* Ho. Com. Jour. of subsequent years.

(p) Per Lord Denman, C.J., in *Stockdale v. Hansard*, 8 A. & E. 114.

(q) Per Patteson, J., in *Stockdale v. Hansard*, 9 A. & E. 195; and see per Little Dale, J., *Ibid.*, p. 169.

(r) *Gossett v. Howard*, 10 Q. B. 411.

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punish for
Contempts.

or created under the authority of an Act of the Imperial Parliament (s). The power of committing for contempts, therefore, does not belong to every colonial legislative assembly: nor can the power be said to be incident to a legislative assembly by analogy to the English courts of record, which, having *judicial functions*, possess the power of adjudicating upon, and punishing, in a summary manner, contempts of their authority. In *Beaumont v. Barrett* (t) it was held that the power of punishing contempts is inherent in every assembly possessing a supreme legislative authority; whether such contempts tend indirectly to obstruct their proceedings, or directly to bring their authority into contempt. And that the House of Assembly in Jamaica being possessed of supreme legislative authority over that island and its dependencies, has such power, and was therefore justified in committing a party guilty of publishing certain libellous paragraphs which had been resolved a breach of the privileges of the House, to the custody of the keeper of the common gaol in that island, to be detained during the pleasure of the House. But in the subsequent case of *Kielley v. Carson and others* (u), it was held that the House of Assembly of the island of Newfoundland did not possess, as a legal incident, the power of arrest with a view of adjudication on a contempt committed out of the House; but only such powers as were reasonably necessary for the proper exercise of its functions and duties as a local legislature. And Parke, B., in delivering the judgment of the court, observed upon his former judgment in the case of *Beaumont v. Barrett* (in which he had held that the power of punishing for contempts was incidental to every legislative assembly) that the opinion he so expressed was in some degree extra-judicial, and was not the only ground on which the judgment in that case rested: that he and their lordships did not consider that case as one by which they ought to be bound in deciding the present case: and further, that the *dictum* of Lord Ellenborough in *Burdett v. Abbot* (x) could not be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt: the observation having been made by his lordship with reference to the peculiar powers of Parliament, and ought not to be extended any further (y).

(s) *Fenton and another v. Hampton*,
11 Moore, P. C. C. 347.

(t) 1 Moore, P. C. C. 59.

(u) 4 Moore, P. C. C. 63.

(x) 14 East, 1.

(y) *Kielley v. Carson and others*, 4
Moore, P. C. C. 91.

Following the authority of the case, *Kielley v. Carson*, it was held in a more recent one, that the House of Keys in the Isle of Man has not, in its legislative capacity, the power to commit for contempt (z).

A distinction is to be made between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting: the latter power being necessary for self-preservation. So, if a member of a colonial House of Assembly be guilty of disorderly conduct in the House whilst sitting, he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence (a).

Distinction between power to punish for Contempt and power to remove for disorderly conduct.

And where a member of the House of Assembly in the island of Dominica was committed by warrant of the Speaker for a contempt of the House whilst the House was sitting; it was held, that the House of Assembly had no power to commit or punish for contempt; but, that members guilty of disorderly conduct in the House, whilst the House is sitting, might be removed; and the law would sanction such a degree of force as might be necessary to remove such members, and keep them excluded for a time (b).

But the Legislative Council and Assembly of the Colony of Victoria, have the privilege of committing for contempt: that assembly having, by certain colonial and imperial Acts (c), similar powers and privileges to those enjoyed and exercised by the Commons House of Parliament in Great Britain and Ireland, and by the committees and members thereof (d). And accordingly it has been held, that the House of Assembly of Victoria has the power, or privilege, under the above-mentioned Acts, not only of committing for contempt, but of itself judging of what is contempt; and of committing for such contempt by a warrant, stating generally that a contempt has taken place, without specifying the nature of the contempt (e).

(z) *In re James Brown*, 33 L. J. Q. B. 193; 5 B. & S. 280.

(a) *Doyle and others v. Falconer*, 36 L. J. P. C. C. 37; L. R. 1 P. C. Ap. C. 328; and see *Regina v. Macpherson*, 7 Moo. P. C. C. (N. S.) 49; 39 L. J. P. C. C. 59.

(b) *Doyle and others v. Falconer*, *supra*.

(c) See 18 & 19 Vict. cap. 55, sec. 35. Also 20 Vict. (Victoria Acts) 1857, No. 1.

(d) *Dill v. Murphy and another*, 1 Moore, P. C. C. (N. S.) 487.

(e) *Victoria, Speaker of Ho. of Assembly of, v. Glass*, 40 L. J. P. C. C. 17; L. R. 3 P. C. C. 560; 7 Moore, P. C. C. (N. S.) 449.

CHAPTER
XXIX.

The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment (*f*).

Where a limited authority exists for punishing contempts, the warrant of commitment must show on the face of it that the alleged contempt was committed in the presence of the House, and so falling within the limits of that authority (*g*).

CHAPTER XXX.

PUBLICATIONS EXCITING TO AN ILLEGAL ACT.

*Publications exciting to an illegal act,
what are.*
*Communications tending to acts of
personal violence.*

Defamatory pictures, effigies, &c.
Libels reflecting on deceased persons.
*Libels upon a class, body, or religious
sect.*

CHAPTER XXX.

*Publications
exciting to an
illegal act :
what are.*

UNDER this head may be classed challenges to fight, and attempts to provoke persons to send such challenges; also defamatory effigies, pictures and signs, by which persons are held up to public infamy, ridicule, and contempt, and might thereby be provoked to anger and acts of violence. And of the same class and tendency are libels reflecting on the memory of the dead, and libels upon a class or body.

The mischievous quality of the communication may consist in its tendency to excite an individual to the commission of some illegal act; and this offence may consist either in a direct solicitation, or in the holding out some indirect but forcible motive to the commission of such an act. And where the solicitation is not followed by the actual commission of the offence contemplated, it is perfectly clear that the adviser is liable to be punished for his wilful attempt to violate the law through the agency of another (*a*). And, secondly, the holding out any indirect but forcible motive, to induce the commission of an illegal act, is in itself indictable. Thus, it is not only illegal to send a challenge to fight, but even an attempt

*Sending a
challenge to
fight.*

(*f*) *Fielding and others v. Thomas* (1896), App. Cns. 600.

(*g*) *Doyle and others v. Falconer*, 36 L. J. P. C. C. 33.

(*a*) *R. v. Philips*, 6 East, 464; *R. v. Southerton*, 6 East, 126; *R. v. Higgins*, 2 East, 5.

to provoke another to send such a challenge is a misdemeanour : CHAPTER XXX.
since the endeavour is an act done towards the accomplishment
of the offence (b).

With respect to communications tending to acts of personal violence, there is an important distinction between words spoken, and written or printed publications ; the former are not indictable, though they be scurrilous, and reflect upon the character of an individual, or even be addressed personally to him, unless they amount to a direct solicitation to a breach of the peace, as by a challenge to fight (c). Communications tending to acts of personal violence.

It seems to be perfectly settled that a malicious defamation of any person, expressed in print or in writing, or by means of effigy, picture or sign, and tending to provoke a person to anger and acts of violence, or to expose him to public hatred, contempt, or ridicule (d), amounts to a libel, in the indictable sense of the word. And since the reason is, that such publications manifestly tend to a disturbance of the public peace, the degree of discredit is immaterial to the essence of the libel ; since the law cannot determine the degree of forbearance which a party reflected upon will exert before he is excited and provoked to acts of outrage ; and therefore prohibits, equally, all imputations conveyed by such means, and possessing such a tendency (e). Defamatory Pictures, Effigies, &c.

Where the plaintiff brought an action of trespass against the defendant for destroying a picture of the plaintiff's, upon the trial it appeared that the picture in question, entitled "La Belle et La Bête," was a caricature representation of a gentleman and his wife, who was sister to the defendant, and that it had been publicly exhibited for money until the defendant cut it in pieces. The plaintiff insisted that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition. The defendant contended that it was a public nuisance, which everyone had a right to abate by destroying the picture. Lord Ellenborough, C.J. : "The only plea upon the record being the general issue of 'not guilty,' it is

(b) 6 East, 464.

(c) 6 Mod. 125 ; 2 Ld. Ray. 1030 ; and see *The Queen v. John Rea*, 17 Ir. C. L. R. 584.

(d) 3 Blac. Com. 150 ; Haw. Pl. Cr. c. 73, s. 1 ; 5 Co. 125 ; 5 Mod. 165 ; Salk. 418 ; Str. 422, 791 ; 12 Mod. 221 ; Ld. Ray. 416 ; 1 Sid. 270 ; Bac. Ab. tit. "Libel," A. 2.

(e) Phidias, the celebrated sculptor, was prosecuted for a libel and thrown into prison, because he had represented on the shield of Minerva some circumstances which impeached the credit of the ancient history of Athens and of their founder Theseus.—*Plutarch in Periclem*.

CHAPTER XXX. unnecessary to consider whether the destruction of this picture might or might not have been justified. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture: and the plaintiff was both *civilly* and *criminally* liable for having exhibited it" (*f*).

Libel by exhibition of wax model representation.

The proprietors of a wax-work exhibition were held liable in an action for libel in publicly exposing to view a wax model representation of the figure of a person (with accompanying incidents) who had been put upon his trial in Scotland for wilful murder, but which trial resulted in a verdict of "not proven" (*g*).

Libel by burning in effigy.

So too, the public exhibition and burning in effigy of a person may be libellous. But in these, as in other charges of libel, it is always a question for the jury, upon a proper direction by the judge, whether the exhibiting and burning an effigy of the plaintiff was, under the circumstances proved in evidence, libellous of the plaintiff, as tending to bring him into hatred, contempt, or ridicule. And it is not sufficient to prove that the defendants were present on the occasion; it must be proved that they were responsible for, or accessories to, the exhibition (*h*).

Setting up a Lamp.

An action was supported against the defendant for setting up a lamp adjoining to the dwelling-house of the plaintiff, and keeping it burning in the day-time, with intent to defame the plaintiff as the keeper of a brothel (*i*).

Libels reflecting on deceased persons.

The law of England, with a view to preserve the peace and happiness of families, which may be invaded and embittered by contemptuous reflections on the dead, has assigned a punishment for such libels as traduce the memory of the deceased; and have thus an obvious tendency to excite the resentment of the living. This principle, however, is never carried so far as to trespass on the utility of history, and the salutary freedom of the press therein. The court will always take into consideration the mind with which such publications are made, and discriminate the historian from the slanderer.

(*f*) *Du Bost v. Beresford*, 2 Camp. 511.

(*g*) *Vide Monson v. Tussaud* (1894), 1 Q. B. 671; 63 L. J. 454; *vide* also *Austen v. Culpepper*, 2 Show. 314, in which the court cited the case of *Sir William Bolton v. Dean*, where an action was maintained for scandalizing the plaintiff by carrying a fellow about

with horns blowing at the plaintiff's door, &c.

(*h*) *Eyre v. Garlick*, *Eyre v. Franklin*, 42 J. P. 68, per Cockburn, L.C.J., and Manisty, J.

(*i*) *Jefferies v. Duncombe*, 11 East, 226; and see *Spall v. Massey*, 2 Starkie's C. 559.

An indictment (*k*) lies for a libel reflecting upon the memory of a person who is dead, if it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief cause of punishing offences of this nature is their tendency to a breach of the peace (*l*); and therefore although the party be dead at the time of publishing the libel, yet (according to Lord Coke) it stirs up others of the same family, blood, or society, to revenge, and to break the peace (*m*).

An information was filed against the defendant, a clergyman, for a libel upon the deceased Queen Mary; the words of the libel (so far as they are stated in the report) were,—“Mary’s Epitaph. Here lies King James’s disobedient daughter, who was addicted,” &c. It appeared that the defendant wrote the libel from the dictation of another person; but the Court held that he was thereby guilty of *making* the libel (*n*).

The defendant was found guilty upon an information charging him with speaking treasonable words of the dead (*viz.*)—“King Charles the first was rightly served in having his head cut off, and it was a pity that his two sons, Charles and James, were not served so too.” Upon motion in arrest of judgment, that the words were spoken of the dead, and were not averred to have been spoken with an intention to prejudice the Government. *Sed per curiam*—“these words affect the living, though spoken of the dead, and there needs no averment that they were spoken with intent to injure the Government, for the words import a crime, and endanger the Queen and monarchy” (*o*).

The defendant, a bookseller, was in the year 1824, indicted for the publication of a libel on his then late Majesty King George III.; which libel was alleged to have been published with intent to defame, &c., the memory and reputation of his said late Majesty, and to disturb and disquiet the minds and destroy the comfort and happiness of the then King and other descendants of his late Majesty, and to bring them into public scandal, disgrace, and contempt amongst all the subjects of the

CHAPTER XXX.

Libels on a deceased Queen.

Libel on a deceased King, tending to bring his successor into contempt.

(*k*) 5 Co. 125; Haw. P. C., book 1, c. 28, “Libels,” s. 1; *The King v. Topham*, 4 T. R. 126.

(*l*) 5 Co. 125; Pult. De Pace Regis et Regina, p. 2; 5 Bac. Abr. tit. “Libel,” 198.

(*m*) By the laws of Solon, libelling the dead was punished and prohibited,

as disturbing the quietude of families and the public peace.

(*n*) *Rex v. Pain*, H. T. 8 Wm. III.; Holt, Rep. 294; Comb. 358; Carth. 405; and *vide* Pulton’s De Pace Regis et Regina, p. 2.

(*o*) *The Queen v. Tayler*, 2 Anne, B. R.; 3 Salk. 198; 2 Ld. Ray. 879.

CHAPTER XXX. realm. At the trial, it was ruled, by Abbott, L.C.J., that a publication tending to disturb the minds of living individuals, and to bring them into contempt and disgrace, by reflecting upon persons who are dead, is an offence against the law. That the question was only whether the publication was defamatory of his late Majesty and calculated to disquiet the mind of his present Majesty and to bring his descendants into disgrace, contempt, and scandal. And the learned judge in summing up the case to the jury observed,—that human society and human nature were so constituted that the honour and dignity of a father were connected with that of a son; and there was no son who must not be disturbed and disquieted by imputations on his father. If therefore the jury considered this publication of that character, it would follow that its effect must be to bring the son into scandal and disgrace. If it was defamation, it could not be entitled to the latitude which should be afforded to free discussions of the events of the reign and of the character of the late King; and it must have the effect of disturbing the minds of his present Majesty and the other members of his family, and of bringing them into disgrace. After verdict of guilty; on motion to the court for a new trial, the ruling of the learned judge was upheld (*p*).

Libellous
reflections on
deceased
persons, tend-
ing to provoke
living
descendants.

In the case of *The King v. Critchley* (*q*), an information was granted against the defendant for publishing a libel reflecting upon the then late Sir Chas. Gaunter Nicoll, M.P. (Lady Dartmouth's father), and on the Government; imputing that the said Sir Charles had obtained the honourable order of Knighthood of the Bath, by vile and unprincipled means; that he had acted as an enemy to the kingdom, and had voted as a member of parliament corruptly, &c. : and maliciously to fix a mark of infamy, contempt and dishonour on the name and family of the said Sir Chas., and to excite the hatred and ill-will of the subjects of the King, against the family and posterity of the said Sir Chas. In another case, the defendant was indicted for printing and publishing in a newspaper called "The World," a libel reflecting on the memory of the late Earl Cowper (*r*), imputing that the Earl had led a wicked and profligate life, and had been addicted to the practice and use of criminal and unmanly vices, &c. The defendant was tried before

(*p*) *The King v. Hunt* (1824), St. Tr. 2 N. S. 69

(*q*) H. T. 7 Geo. II.; 4 T. R. 129, note (a).

(*r*) *Rex v. Topham*, 4 T. R. 126;

H. T. 31 Geo. III.; and see *Rex v. Walter*, T. T. 39 Geo. III., 3 Esp. 21, where the defendant was convicted for a libel on the deceased Lord Cowper.

Mr. Justice Buller, and convicted. But judgment was afterwards arrested for a defect in the indictment; it not having been alleged that the libel was published with intent to scandalize and defame the family and posterity of the deceased, nor to excite them to a breach of the peace. And it was observed by Lord Kenyon, C.J., in delivering the judgment of the court,—that, “To say that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose to vilify the memory of the deceased, and with a view to injure his posterity as in *R. v. Critchley*, then it is done with a design to break the peace and it becomes illegal.”

A criminal information was granted against three persons, the proprietor, printer, and publisher respectively of “The John Bull” newspaper, for printing and publishing a libel on the deceased wife of Sir John Wrottesley, Bart. The libel alleged that the lady had been detected in a criminal intrigue with one of her menial servants. The defendants were tried before Abbott, L.C.J., and were severally convicted, fined, and imprisoned (*). In this case it was alleged in the information that the libel was published with intent to vilify the memory, reputation, and character of the deceased lady, and to bring her surviving husband, the said Sir J. Wrottesley, and the children, family, and relations of the deceased lady into scandal, infamy, contempt, and disgrace; and to stir and excite them to a breach of the peace (†).

Where an application was made on behalf of the Duke de Vallombrosa, for leave to file a criminal information for a libel on the Duke’s deceased father; the libel was of a very gross and provoking nature, and undoubtedly tending to a breach of the peace by the deceased’s son and other members of the family. The application was against the proprietor of an English newspaper; but the court held, that the weight of authority was against the granting of a criminal information for a libel on the dead, unless the character of the applicant himself is also

(*) *The King v. Wearer and others*; *Sir John Wrottesley’s case*, E. T. 2 Geo. IV. (†) See the form of Information used in this case, *infra*, “Precedents.”

CHAPTER XXX. individually aspersed ; and in the present case, as the applicant himself was neither resident nor sojourning in this country, thereby rendering it very unlikely that the libel would lead to a breach of the peace, the application was refused (*u*).

In a subsequent case tried before Stephen, J., on the South Wales circuit (*x*), for an alleged libel on the late John Batchelor, published by the defendant in the "Western Mail" newspaper: at the close of the case for the prosecution, it was objected, that the indictment could not be sustained, as it contained no allegation of any attempt to injure the family of the deceased, and no such had been proved. The learned judge ruled, that there could be no question that if John Batchelor were living the language applied to him would be libellous ; but he died more than three years before it was published ; and to libel the dead was not an offence known to our law. That the dead have no rights and can suffer no wrongs. That the living alone can be the subject of legal protection, and the law of libel was intended to protect them, not against every writing which gave them pain, but against writings holding them up individually to hatred, contempt, or ridicule. That it was possible, under the mask of attacking a dead man, to libel a living one : but that the intent so to injure was a fact requiring proof, and necessary to be found by the jury ; and not an inference by which they were bound from the terms of the writing reflecting on the dead man. That it was a fatal objection to several of the counts of the indictment, that they averred only a tendency, and not an intention, to injure and excite to a breach of the peace ; and that there being no evidence of any intention to injure and bring contempt on the family, but only to injure the character of the late Mr. Batchelor himself, the defendant must be acquitted.

Where a suit was brought in India, by the heir and nearest relative of a deceased person, for defamatory words uttered at a funeral, and alleged to have caused damage to the plaintiff as a member of the same family ; it was held that the suit was not maintainable (*y*).

Libels tending
to raise tumult
and disorder
among a Class
or body.

An information was prayed against the defendant for publishing a paper containing an account of a murder, alleged to have been committed upon a Jewish woman and her child, by

(*u*) *The Queen v. Labouchere*, 12 Q. B. D. 320 ; 53 L. J. 362.

(*x*) *Reg. v. Ensor* (Feb. 1887). 3 Times L. Rep. 366.

(*y*) *Luckumsey Rowji v. Hurban Nursey and others*, Indian L. R. 5 Bombay, 580.

certain Jews lately arrived from Portugal, and living near CHAPTER XXX.
 Broad Street, because the child was begotten by a Christian ;
 and the affidavit set forth that several persons mentioned
 therein, who were recently arrived from Portugal, and lived in
 Broad Street, had been attacked by multitudes, in various
 parts of the city, barbarously treated, and threatened with
 death, in case they were found abroad any more ; and it was
 objected that no information could be granted, because it did
 not appear, in particular, who the persons reflected upon were.
 But by the court, " Admitting that an information for a libel
 may be improper, yet the publication of this paper is deservedly
 punishable in an information for a misdemeanour, and that of
 the highest kind ; such sort of advertisements necessarily
 tending to raise tumults and disorder among the people, and
 to inflame them with a universal spirit of barbarity, against a
 whole body of men, as if guilty of crimes scarcely practicable,
 and wholly incredible " (z).

Although a person has a right to entertain his opinions, Libels upon religious sects.
 to express them, and to discuss the subject of the Roman
 Catholic religion and its institutions, he has no right to say of
 a particular body of persons (*e.g.* the inhabitants of Scorton
 Nunnery) that the place they inhabit is a " brothel of pros-
 titution " ; for in doing that he is attacking the individual
 characters of the body of whom Scorton Nunnery consists (a).

CHAPTER XXXI.

PUBLICATIONS TENDING TO DISTURB THE PEACE OF NATIONS.

<i>Libels tending to Disturb the Peace of Nations.</i>	<i>Libels on Foreign Potentates and Ambassadors.</i>
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EVERY publication is intrinsically illegal which tends to CHAP. XXXI.
 produce any public inconvenience or calamity. Under this
 description those rank highly, in respect of the magnitude of
 their results, which tend to disturb the amicable relations
 which subsist between this and other nations, by malicious
Publications tending to disturb the Peace of Nations.

(c) <i>Rex v. Osburne</i> , Kelynge, 230, pl. 183 ; 2 Barnard. K. B. 138, 166 ; and <i>vide Rex v. Williams</i> , 5 B. & Ald.	595 ; and <i>vide post</i> . (a) <i>Reg. v. Gathercole</i> , 2 Lew. C. C. 254, per Alderson, B.
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CHAP. XXXI. reflections upon those who are possessed of high rank and influence in foreign states. As the natural tendency of these is to involve the Government in a foreign war, their authors have, in several instances, been punished as offenders at Common Law. Thus, in the case of *The King v. D'Eon* (a), an information was filed against the defendant, by the Attorney-General (b), for publishing a libel upon the Count de Guerchy, who, at that time, was residing in this kingdom, in the capacity of ambassador from the Court of France. The information charged the defendant with an intention to defame the character and abilities of the Count de Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behaviour in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of ambassador: and the defendant was convicted. In another case, *Lord George Gordon* was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction. Mr. Justice Ashhurst, in passing sentence, observed, that unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the State (c).

Reflections on
Foreign
Ambassadors.

Libels on
Foreign
Potentates.

The defendant, *John Vint* (d), was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia is rendering himself obnoxious to his subjects, by various acts of tyranny, and ridiculous in the eyes of Europe, by his inconsistency; he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight"; with intent to traduce the Emperor of Russia, and to interrupt and disturb the friendship subsisting between that country and Great Britain. *Jean Peltier* (e) was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic; and to excite and

(a) East. T. 4 Geo. III. 1764; 28 Geo. III.; 22 St. Tr. 213.
K. B. MSS. Dig. Law Lib. 87.

(b) Sir Fletcher Norton.

(c) *R. v. Lord Geo. Gordon*, Hil. T.

(d) 40 Geo. III. (1801), *R. v. Vint*.

(e) K. B. 43 Geo. III., *R. v. Peltier*,

28 St. Tr. 529.

provoke the citizens of the said republic to deprive the said CHAP. XXXI.
 Napoleon Bonaparte of his consular dignity, and to kill and
 destroy him, and to interrupt the friendship and peace sub-
 sisting between our lord the King and his subjects and the
 said Napoleon Bonaparte and the French Republic. The
 most obnoxious passages of the libel were these: "Oh!
 eternal disgrace of France; Cæsar, on the banks of the Rubicon,
 has against him in this quarrel the Senate, Pompey, and Cato;
 and in the plains of Pharsalia, if fortune is unequal, if you
 must yield to the destinies, Rome, in this sad reverse, at least
 there remains to avenge you, a poignard among the last
 Romans." "As for me, far from envying his (Bonaparte's)
 lot, let him name (I consent to it) his worthy successor;
 carried on his shield, let him be elected Emperor. Finally
 (and Romulus recalls the thing to mind), I wish that on the
 morrow he may have his apotheosis. Amen!" Upon the
 trial, Lord Ellenborough, C.J., referred to the cases of *Lord*
George Gordon and *Vint*, and said, "I lay it down as law, that
 any publication which tends to degrade, revile, and defame
 persons in considerable situations of power and dignity in
 foreign countries, may be taken to be, and treated as a libel;
 and particularly where it has a tendency to interrupt the amity
 and peace between the two countries" (f).

(f) In the year 1858 M. de Montalembert was prosecuted by the Government of France for a libel against the law of nations, published in France in a monthly journal, called "The Correspondent." The libel was an article called "A debate on India in the English Parliament." The heads of accusation charged against Montalembert in the *Assignment* (indictment)

were: 1. That the publication was inciting to the hatred and contempt of the Emperor's Government. 2. Was an attack on the respect due to the laws. 3. Was an attack on the rights which the Emperor derives from the Constitution, and on the principle of universal suffrage. 4. Was exciting to the hatred and contempt of the citizens one against another.

CHAPTER XXXII.

CRIMINAL INFORMATIONS FOR LIBEL.

IN WHAT CASES CRIMINAL INFORMATIONS FOR LIBEL MAY BE FILED.

<i>Jurisdiction as to Criminal Informations.</i>	<i>Libels on Public Bodies and Institutions.</i>
<i>The two classes of Criminal Informations.</i>	<i>Crown Office Rules as to Criminal Informations.</i>
<i>Informations ex officio.</i>	<i>General requirements on applications for Criminal Informations.</i>
<i>Nature and object of Informations ex officio.</i>	<i>As to the Affidavits in support of the application.</i>
<i>Informations filed by Order of the Court.</i>	<i>As to the exhibits and drawing up the Order.</i>
<i>General principles as to.</i>	<i>Showing cause against the Order.</i>
<i>Libels reflecting on the administration of Justice.</i>	<i>Information, requisites of.</i>
<i>Libels affecting persons in their Official character.</i>	<i>Security for Costs, Appearance, &c.</i>
	<i>Pleading to the Information.</i>
	<i>Costs on Criminal Information.</i>

CHAP. XXXII.

Jurisdiction as to Criminal Informations.

THE proceeding by criminal information is a high prerogative jurisdiction, derived from the common law of the land, and the usage and practice of the Court of King's Bench, in which such informations were exhibited (a).

The jurisdiction is exercisable (*ex officio*) by the Attorney-General, at his discretion, as the prosecutor for the Crown: and by the King's Coroner and Attorney, as the prosecutor for the public, at the express direction of the King's Bench Division of the High Court of Justice (b).

Distinction between procedure by Criminal Information and by Indictment.

The main distinction between a prosecution by criminal information, and by indictment, is in the preliminary proceedings before trial. In a proceeding by indictment, before

(a) See *Wilkes' case*, Burr. 2527, per Lord Mansfield. As to the great antiquity and acknowledged legality of the proceeding by information, see the argument of Sir Bartholomew Shower, 1 Show. Rep. 106; 4 Blac. Com. 305, whence it appears to have been as ancient as the law itself. Indeed no doubt can possibly rest upon the legality of a practice which has prevailed for centuries, and been sanctioned by several Acts of the Legislature. *Vide* 4 & 5 W. & M. c. 18; 48 Geo. III. c. 58; 60 Geo. III. & 1 Geo. IV. c. 4, s. 8; 11 Geo. IV. &

1 Wm. IV. c. 70, s. 9; 6 & 7 Vict. c. 96, ss. 6, 7, and 8. And see the observations of Lord Brougham, Ch., in the Report of the Select Committee of H. L., 1843, p. 3.

(b) Criminal informations are confined by the constitutional law to mere misdemeanours only: for wherever any capital or felonious offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the accused shall be put upon his trial to answer it. See 4 Blac. Com. 310.

the party can be put upon his trial for the offence charged CHAP. XXXII.
 against him there must be a preliminary investigation before a justice of the peace, and a committal for trial; there must also be an inquest and presentment by a grand jury: but in the proceeding by criminal information, those formalities are dispensed with; the substituted process being a more prompt and ready proceeding, whereby in the case of informations *ex officio*, the matter is investigated by the Attorney-General on behalf of the Crown; who then, in his discretion, causes an information to be filed: and the defendant is afterwards tried upon the information before a jury at the Assizes, or on the Crown side of the King's Bench Division. And in the case of informations by the King's Coroner and Attorney, the matter is first brought immediately before the court in the form of an interlocutory application; in the preliminary stages of which the matter is investigated by the court; first as to whether there be grounds for granting a rule or order *nisi*, for putting the party upon his trial to answer the charge: and secondly, the court never grants leave to file an information without giving the party against whom it is prayed, an opportunity of showing cause against the application: and therefore, in many cases, although an order *nisi* be granted, leave to file the information is afterwards refused on showing cause, and the application dismissed accordingly. But where the rule or order is made absolute, the subsequent proceedings, the trial, &c., are the same as those upon a trial by indictment except that there is no inquest by a Grand Jury. The defendant is brought to trial upon the information, before a judge and (usually) a special jury; and any plea or defence that would be available to him on his trial by indictment is available on the trial of a criminal information; and this whether it be filed *ex officio* by the Attorney-General, or by the King's Coroner by leave of the court.

Criminal informations are exhibited in the name of the King; and are of two classes: Criminal Informations are of two classes.

1. Those which are properly his Majesty's own suits; and filed *ex officio* by his own immediate officer, the Attorney-General.

2. Those in which, though the King is the nominal prosecutor; yet it is at the relation of some public or private person, termed "the relator." These are filed by the King's Coroner and Attorney, in the Crown Office of the High Court of Justice, by the express direction of that court, or of a divisional branch thereof, termed the "King's Bench

CHAP. XXXII. Division" (c); on order (formerly rule) absolute, after no sufficient cause shown on argument of the rule, or order *nisi* (d). Leave to file criminal informations cannot be granted by Courts of Assize, nor by Courts of Oyer and Terminer, nor by justices of the peace (e).

Informations
ex officio.

1. *And first, as to Informations ex officio.*

Informations *ex officio*, may be filed by the Attorney-General, for any misdemeanour which tends to disturb or endanger the King's Government; or immediately to prejudice or interfere with the interests of the Crown; or to molest or affront the Sovereign in the discharge of his royal functions. This power is usually exercised in the case of seditious publications; of libels on the Crown; the Constitution, or the Government: so also for libels on the King's ministers, judges, foreign ambassadors, and other high officers of State; reflecting upon their conduct in the execution of their official duties: so also for blasphemous, and obscene publications; and in cases of offences against the revenue, seditious conspiracies, and such other misdemeanours as in the opinion of the Attorney-General require his special interference.

As to the degree of mischief, or the necessity which renders it advisable to call in aid the extraordinary process by criminal information, such are matters resting in the discretion of the Attorney-General for the time being; whose duty it is, as the legal agent of the Crown, to bring under the immediate cognizance of the Court, all such libels and other misdemeanours as come within the description above indicated.

When Informations *ex officio* may be filed by the Solicitor-General.

In the event of the illness of the Attorney-General, or of a vacancy in that office, informations *ex officio* may be filed by the Solicitor-General (f): and it is not necessary, in that event, to enter a suggestion of such illness or vacancy upon the record (g).

Nature and object of Informations *ex officio*.

The object of the information *ex officio* is, to meet, within as short an interval as possible, those more serious misdemeanours which require prompt suppression, and as to which it would

(c) R. S. C., Ord. LIX., r. 1 (a); and Crown Office Rules, 1906, rr. 32—39.

(d) Informations of this class were formerly filed at the suggestion of the applicant, by the master of the Crown Office; and at the discretion of that officer, without any direct application to the court; but the practice was put an end to by the statute 4 & 5 Wm. & Mary, c. 18; which enacts, that

the clerk of the Crown shall not file any information without an express order by the Court of King's Bench, given in open court.

(e) Jones, 193; Vin. Abr. "Information," 414.

(f) See *Rex v. Wilkes*, Hil. T. 10 Geo. III.; 4 Burr. 2527, 2553.

(g) *Ibid.*, 2555, 2576.

not be prudent to wait for the presentment of a grand jury. CHAP. XXXII.
 The main efficacy of the information *ex officio* consists in the speedy application of the law. It would therefore be contradictory to their nature to subject them to the delay of an application to the court for an order *nisi*. It would, moreover, be an inversion of all legal ideas of the Sovereign's supremacy, to reduce him to the solicitation of leave to file a criminal information from his own court; and to subject him to such a contumacious repetition of the injury, as might be contained in a defensive answer to a rule (or order) *nisi*. Added to which, the proceeding *ex officio* is used only in such cases as are manifest infringements of the law; and therefore do not admit of affidavits in denial, excuse, or extenuation.

In the case of libels, this power has been exercised where they tend to subvert religion or morality; to excite discontent against the Constitution, the King, or his Government; to involve the country in foreign wars; or to excite particular classes of people to acts of tumult and outrage; but it has not been usual for the Attorney-General to interfere in his official capacity where the libel affects a private individual only. For what libels usually filed.

The court will never grant an information upon the application of the Attorney-General in cases prosecuted by the Crown; because the Attorney-General has a right himself to exhibit such. And so, where Mr. Attorney-General De Grey moved, on behalf of the Crown, for a rule to show cause why an information should not be granted against the defendant, "for certain misdemeanours in his office as a justice of the peace of Plymouth," Lord Mansfield, C.J., rejected the motion; declaring that he would never grant a rule for an information applied for by the Attorney-General on behalf of the Crown; because the Attorney-General has himself power to file an information if he judges it to be a proper case for one: and if he did not think it a proper case, it would equally be a reason why the court should not intermeddle (*h*). And the court will not interfere upon the application of the defendant, to restrain the Attorney-General from filing an *ex officio* information, on the ground that a criminal information has already been filed for the same cause: but the court will stay the information previously filed, until further order (*i*). And although a defendant be prosecuted by informations filed by the Attorney-General, as well as by indictments preferred by a In Crown Cases the Court will not interfere. Nor restrain proceedings by the Attorney-General.

(*h*) *Rex v. Phillips*, 4 Burr. 2089.

(*i*) *Rex v. Alexander*, E. T. 1830.

CHAP. XXXII. private prosecutor for different publications of copies of the same libels, the court will not restrain the proceedings (k): because every copy sold by the defendant is a separate publication, for each of which he is liable to be prosecuted criminally (l).

Nor quash an Information *ex officio*.

The court will not quash an information filed by the Attorney-General, either upon motion by the defendant, or by the Attorney-General himself (m). In the case of such an application by the defendant, he will be required to plead or to demur: and if the Attorney-General finds his own information to be defective, he has power to enter a *nolle prosequi* without the interference of the court, and to file another (n): and where he has entered a *nolle prosequi* to an indictment for a seditious libel, he may file an *ex officio* information against the defendant for the same offence (o).

An information filed *ex officio* for seditious libel may be upheld notwithstanding that the words "seditious" or "seditiously" are not expressly used; if it be shown on the face of the information, that the publication was with seditious intent (p).

Defendant entitled to a Copy of the Information.

Where the information is filed by the Attorney or Solicitor-General, the court must if required, order a copy of the information to be delivered, after appearance, to the defendant or his clerk in court, or attorney, free of expense; provided no copy has been previously given (q).

Trial must not be delayed.

If the information be not brought to trial within twelve months after the plea of "Not Guilty" pleaded, the court may, on the defendant's application (of which twenty days' notice must be given to the Attorney-General or to the Solicitor-General), allow the defendant to bring on the trial (r). And, independently of the enactment, if the defendant can show that he has been prejudiced or aggrieved by unnecessary delay, the court will, on his application, upon notice duly given to the Attorney-General, appoint a day for the trial (s).

Postponement of trial.

It is in the discretion of the court to postpone the trial of an (k) *The King v. Carlile*, 1 Chit. R. 451. (p) *Reg. v. M'Hugh* (1901), 2 Q. B. D. (Ir.) 569.

(l) *Ibid.*, 458.

(m) 1 Salk. 372; *Rex v. Stratton*, 1 Doug. 239; Com. Dig. Information, D. 4; but see 1 Sid. 152, *Fountain's case*.

(n) *Ibid.*; and see 4 T. R. 457.

(o) *The Queen v. Mitchell*, 3 Cox, C. C. 93; 1 Ir. Jur. 4.

(q) 60 Geo. III. & 1 Geo. IV. c. 4, s. 8.

(r) 60 Geo. III. & 1 Geo. IV. c. 4. Prior to this statute the Att.-Gen. might delay bringing on the trial as long as he pleased. *Vide* 11 Harg. St. Tr. 272.

(s) 2 Salk. 653; 2 East, 209.

information *ex officio* on good cause shown—as the absence abroad of an indispensable witness. An affidavit (t), in support of an application by a defendant to postpone the trial, must show sufficient and satisfactory grounds (u). CHAP. XXXII.

On the trial of informations filed by the Attorney-General, *ex officio*, he has the right to reply, even though the defendant calls no witnesses (x). The Attorney-General cannot himself be called as a witness to be examined as to his motives for instituting the prosecution (y). And he is not in any case liable to an action, on the supposition that he has filed the information maliciously or without any reasonable or probable cause (z). Proceedings on trial of *ex officio* Information.

If the defendant be convicted, he may be committed in the interval between the verdict and judgment, if the Attorney-General moves the court to that effect. Or he may be admitted to bail; or permitted to remain at large on his own recognizance to come up for judgment on a day named. Judgment is not pronounced until moved for by the Attorney-General; who may, if he thinks fit, exercise a virtual prerogative of pardon by entering a *nolle prosequi*; or he may decline to move for judgment.

If the defendant, on the trial of an information filed *ex officio* by the Attorney-General, be acquitted or found not guilty, he cannot recover any costs. The statute (a) which gives costs to a defendant on acquittal, in informations filed by order of the court, on the application of a relator, does not apply to informations filed by the Attorney-General (b). And with regard to informations under the Libel Act, 1843, s. 8, that enactment does not apply to the costs of informations filed by the Attorney-General *ex officio* (c). No Costs on acquittal.

2. *As to informations filed by the King's Coroner and Attorney by order of the court, upon the complaint or relation of a person occupying some official position; and in exceptional cases, merely that of a private individual.* Informations filed by Order of the Court.

In the case of libels, these have usually been granted, where the libel was of such a nature that it tended to produce some public mischief or inconvenience; particularly libels affecting

(t) *Vide* Crown Office [Rules, 1906, tit. "Affidavits," rr. 5—11.

(u) 11 Price, 229; 1 McClell. R. 251.

(x) 11 Harg. St. Tr. 273; *R. v. Marsden*, Moo. & Mal. 439.

(y) 11 Harg. St. Tr. 283.

(z) 1 T. R. 535.

(a) 4 & 5 W. & M. c. 18.

(b) *Ibid.*, s. 6.

(c) *The Queen v. Duffy*, 9 Ir. L. R. 329.

CHAP. XXXII. persons in considerable station, or holding some public office, or occupying some public or official position ; as—libels reflecting on the administration of justice, and on magistrates in the execution of their offices ; and libels reflecting on a body, class, or sect : but not in the case of private individuals, except for libels of a very mischievous, malignant, or provoking tendency, requiring prompt suppression, or speedy refutation.

Statutory provisions as to Criminal Informations.

By 4 & 5 W. & M. cap. 18, "An Act to prevent Malicious Informations in the Court of King's Bench," no criminal information can be exhibited, received, or filed, without express order of the Court of King's Bench (now King's Bench Division) to be given by the said court in open court ; nor can any process be issued thereon until the person procuring such information to be exhibited, shall have given security, by recognizance, to the person against whom the information is to be exhibited, in the penalty of £20 (*d*) to prosecute the same with effect, and abide by and observe such orders as the court shall direct ; a memorandum of which recognizance shall be filed, and may be inspected by any person, without fee.

Not to extend to *ex officio* Informations by Attorney-General.

The statute contains a proviso that it shall not extend to any other informations than such as shall be exhibited in the name of their Majesties' coroner or attorney, in the Court of King's Bench, for the time being. Consequently informations at the King's own suit, filed by the Attorney-General *ex officio*, are not within the scope of the statute.

General Principles upon which Criminal Informations granted.

And although the practice of the court with regard to the exercise of this high prerogative jurisdiction as to informations filed by order of the court, has, in the case of libels upon private individuals, fluctuated considerably from time to time ; the remedy has generally been considered as specially applicable to libels affecting persons in their official character, or capacity ; as magistrates, ministers, public officers, and persons in a high position, whose characters are of such public importance as to require prompt vindication : yet, until recently, no general rule to that effect has ever been laid down. Indeed it appears from the records in the Crown Office, and from reported cases, that there have been numerous instances (many within the reign of her late Majesty Queen Victoria) in which criminal informations for libel have been granted by the Court of Queen's Bench, at the suit of private individuals

(*d*) By the Crown Office Rules, 1906, r. 35, the recognizance must be in the penalty of £50.

not holding any public or official position (*e*). But it appears CHAP. XXXII. that the court will now seldom allow a criminal information to be filed on the relation of a private individual unless some public mischief be apprehended by reason of the libel; nor unless the libel be very gross, and has been made public by the party proceeded against; nor where the alleged injury is not a continuing or impending one; nor where it does not appear that the writer or publisher of the libel was actuated by malicious motives towards the relator (*f*). And, according to a recent decision of the Queen's Bench Division, to entitle an applicant to a criminal information for libel, it must be shown that he occupies some public office, and that the libel complained of affects him in such office (*g*).

It may, however, be proper to adduce a few instances, to show the general principles by which the Court has been guided in the exercise of this branch of its jurisdiction, and to refer to the regulations which it has thought fit to make.

Instances are numerous in which the court has given leave to file criminal informations for libels reflecting on the administration of justice; as by publishing invectives against a judge and jury before whom a defendant has been tried, or against magistrates and others, with a view to bring into suspicion and contempt the administration of justice (*h*).

A criminal information was granted against the proprietors and publishers of a local newspaper, for a libel upon the town-clerk, who also held the office of clerk of the peace, of Portsmouth, imputing that he had been influenced by political motives in the exercise of his duties in summoning the jury for the trial of offences at the Borough Quarter Sessions; at which a case was pending for trial arising out of a recent political contest in the borough (*i*).

(*e*) Lord Brougham, C., stated in his evidence given in 1834, before the "Select Committee appointed to consider the state of the law as regards Slander and Libel," that in his time, criminal informations were granted by the Court of King's Bench regardless of the rank of individuals; and in almost any case where the applicant was able to deny upon oath the truth of the matter published: and that it was assumed from the fact of proceeding by indictment, instead of by criminal information, that the prosecutor was unable to deny the truth of

the matter published.

(*f*) *Ex parte Smith*, Q. B. M. T. 1869, MS.

(*g*) *The Queen v. Labouchere*, 12 Q. B. D. 320; 53 L. J. 362.

(*h*) *The King v. Hart and another*, 10 East, 94; *Rex v. White*, 1 Camp. 359; and see *The King v. Watson and others*, 2 T. R. 199; *The Queen v. Wakefield*, H. T. 10 Anne; *Reg. v. Lawson*, 1 Q. B. 486; *The King v. Fleet*, 1 B. & Ald. 379.

(*i*) *The Queen v. Holbrook and others*, 3 Q. B. D. 60; 47 L. J. 35.

For libels reflecting on the administration of Justice.

Libel on a Clerk of the Peace imputing misconduct in Office.

CHAP. XXXII.

Libel imputing
Corruption in
Office to a
Stipendiary
Magistrate.

So, too, a *rule nisi* was granted for a criminal information against one Spurr, and the publisher of "The Hull Eastern Morning News," for a libellous letter written by Spurr and published in that newspaper, imputing partiality and corruption to the stipendiary magistrate of Hull. On showing cause, however, an ample apology was made and the charge withdrawn; and the court said, that the charge which had been made was one of corruption of a very serious kind; but it being admitted now, that there was no foundation for it, and taking into consideration that the defendants both express their regret, and that the relator does not press the application against them, the rule might be discharged; but only upon the condition that the defendants pay all costs as between attorney and client (*k*).

Against Magis-
trates for
corruption and
oppression.

And a criminal information may be granted *against* magistrates for acting corruptly and oppressively, or from motives of resentment or partiality, in the execution of the duties of their office (*l*). But the corrupt, oppressive, or other misconduct, must be clearly shown. If the magistrates acted merely in error, and from mistake only, an information will not be granted (*m*).

Libels on a
Naval Com-
mander and
President of a
Court Martial.

Where the libel imputed to a naval commander (*n*) the want of courage, knowledge, resolution, and veracity; to a peer (*o*), that he acted improperly as president of a court martial, and that he had been guilty of perjury; the court granted informations.

Libels on a
Body, Class,
or Sect.

A criminal information will also be granted, in a proper case, where the libel reflects on a body, class, or sect; though no individuals in particular be pointed out. As if the libel tend to raise tumults and disorder among the people, by exciting their hatred against a whole class (*p*). So also a criminal information was granted against the proprietor and publisher of a newspaper, for publishing general reflections defamatory of the clergy of a particular diocese: and this, though no particular prosecutor was named; and though the libellous matter was not negatived by affidavit (*q*). And so

On the Clergy
of a diocese.

(*k*) *The Queen v. Spurr and another*, Q. B. M. T. 1868, MS.

(*l*) *Rex v. Williams*, and *Same v. Davis*, 3 Burr. 1317; *Rex v. Hann and another*, *ibid.*, 1716.

(*m*) *The Queen v. Badger and another*, 12 L. J. (N. S.) M. C. 66.

(*n*) Trin. 32 Geo. II. *The King v. Dr. Smollett*.

(*o*) *The King v. Thicknesse*, Hil. 3 Geo. III.; Dig. Law Lib. 85, 86.

(*p*) *R. v. Orme*, 2 Salk. 224; and see 1 Ld. Ray. 486; *R. v. Osborn*, Sess. C. 260; 2 Barnard. 138, 166; Kelynge, 230.

(*q*) *Rex v. Williams*, 5 B. & Ald. 595; 1 D. & Ry. 197; St. Tr. 1 N. S. 1291.

also as to publications defamatory of a religious sect, as by imputing that the institution is "a brothel of prostitution" (r). CHAP. XXXII.

Criminal informations at the suit of public bodies, upon the application of certain individuals presiding over them, have also been granted by the court; as in the case of *The King v. Hector Campbell*, for a libel on the College of Physicians (s); and the *Governors of the Foundling Hospital v. Bell and Decamp*, for a libel upon that body (t). On public bodies and institutions.

Criminal informations have been granted for libels on peers and persons of rank and dignity, whose characters were of such public importance as to require prompt vindication: particularly in cases where the libels were of a very gross, mischievous, or provoking nature. As in the case of the Duke of Athol (u), a criminal information was granted against the printer of a newspaper for a libel upon the Duke and his family, imputing that they were held in such general abhorrence in the Isle of Man, that if he should succeed in obtaining the passing of a certain bill then pending in Parliament, it would occasion a public revolt. Libels on Peers and persons of rank and dignity.

So where the libel imputed treasonable designs to a nobleman, an information was granted (x). So against the mayor of a town, for sending to a nobleman a licence to keep a public-house (y). So for representing a bishop as a bankrupt (z).

But, it has been held, in a recent case, that a peer is not entitled, merely as a peer, to the remedy by criminal information for libel; nor to "any interference at the hands of the court which the court would not extend in favour of the humblest subject of the realm": and that a criminal information for libel ought not to be granted upon the complaint or relation of a private subject, unless the libel is of so "gross and notorious a nature, or pernicious example, as to deserve the most public animadversion" (a).

Practice and Procedure as to Criminal Informations for Libel.—An application for leave to file a criminal information Motion for Order nisi, for Criminal Information.

(r) See *Reg. v. Gathercole*, 2 Lew. C. C. 237.

(s) K. B. Hil. T. 1808.

(t) K. B. Trin. T. 1808; and see *Rex v. Baillie*, M. T. 18 Geo. III. A. D. 1778.

(u) B. R., E. T., 30 Geo. III.

(x) Doug. 387.

(y) *Mayor of Northampton's case*, 1 Str. 422.

(z) Hil. T. 1812; and see *The King v. Say*, T. T. 1 Geo. III. 1761; Digest Law Lib. 82.

(a) *The Queen v. Labouchere*, 12 Q. B. D. 329; 53 L. J. 368 (Denman, J., *dissentiente*).

CHAP. XXXII. for libel, must be by motion, made in open court by counsel. An applicant is not, by the practice of the court, permitted to apply in person (*b*). But the accused may show cause in person: though if in gaol on another charge, he cannot obtain a *habeas corpus* to bring him up in order that he may show cause in person (*c*).

Crown Office
Rules as to.

By the Crown Office Rules, 1906 (*d*), the motion for a criminal information must be made to a Divisional Court, for an order *nisi*: and the application must be made within a reasonable time after the offence complained of.

Recognizance
to prosecute.

By Rule 35 (with the exception of *ex officio* informations, filed by the Attorney-General on behalf of the Crown) no criminal information shall be exhibited, received, or filed at the Crown Office without express order of the King's Bench Division, in open court; nor shall any process be issued upon any information (other than an *ex officio* information), until the person procuring such information to be exhibited, shall have filed at the Crown Office a recognizance in the penalty of £50, effectually to prosecute such information and to abide by and observe such orders as the court shall direct; such recognizance to be entered into before the King's Coroner and Attorney, or the master of the Crown Office, or a justice of the peace of the county, borough, or place in which the cause may have arisen.

Notice of
Motion when
necessary.

The Statute which prohibits the filing of any criminal information without the leave of the court (*e*), does not require that any notice of the motion be given to the party against whom the application is to be made. And it has always been the practice of the court to grant a rule *nisi* only, in the first instance: and no alteration is made as to this by the Crown Office Rules. The motion is therefore *ex parte* in the first instance, in all cases except those in which it is against a justice of the peace for misconduct in his magisterial capacity; in which case, before any application for a criminal information against him can be made, a notice containing a distinct statement of the grievances, or acts of misconduct complained of, must be served personally upon him, or left at his residence, with some member of his household, six days before the time named in it for making the application (*f*). And the practice was the same prior to those Rules (*g*). And if the notice name

On application
against a
Justice of
the Peace.

(*b*) 1 Chit. Rep. 602.

(*c*) 3 B. & Ald. 679, note (*a*); and
see *The King v. Abingdon*, 1 Esp. 227.

(*d*) Rule 37

(*e*) 4 & 5 Wm. & M. c. 18, *supra*.

(*f*) C. O. R., 1906, r. 38.

(*g*) *Vide Rex v. Heming*, 5 B. & Adol. 666.

a day for the motion, which is less than six days distant, such defect is not aided by the party forbearing to move within six days (*h*). CHAP. XXXII.

It is also required, in the case of an application against a justice of the peace, for misconduct in his magisterial capacity, that the applicant shall depose, by affidavit, to his belief that the defendant was actuated by corrupt motives; and further, if for an unjust conviction, that the person convicted is innocent of the charge (*i*).

In general, the applicant for leave to file a criminal information must waive his right of action (*h*), and this is an advantage which the defendant derives from this mode of proceeding; for, if convicted under an indictment, the prosecutor would still be at liberty to bring his action to recover damages. And the relator may be put to his election before an information is granted; after which it is a matter of course to stay proceedings in an action for the same libel. Where an order *nisi* for a criminal information is discharged on showing cause, the applicant may bring an action for the publication of the same libel (*l*). But after an order *nisi* for a criminal information has been granted, the court will not postpone the showing cause against such order until a civil action then pending in the same matter shall have been tried (*m*).

The court will not exercise its high prerogative jurisdiction by granting a criminal information if the applicant has elected to apply to some other source for the same, or a similar remedy (*n*). The Applicant must waive his Right of Action.

The court will not grant a criminal information for sending a challenge, if the relator's previous conduct has been so far improper as to have provoked the sending it (*o*). Criminal Information refused where remedy sought elsewhere. Provocation by previous Conduct.

As a general rule, the court will not grant a criminal information in the case of libel, unless there be an exculpatory affidavit specifically denying the charge upon oath (*p*); except where General requirements on applying for leave to file Criminal Informations.

(*h*) *Ex parte Fentiman*, 2 A. & E. 127; 4 Nev. & M. 126.

(*i*) C. O. R. 1906, r. 37.

(*k*) *R. v. Sparrow*, 2 T. R. 198; *The King v. Fielding*, 2 Kenyon, 386: but the court cannot compel an applicant to waive his right of action unless they make the order absolute to file the information.

(*l*) *Wakley v. Cooke and another*, 16 M. & W. 822; 16 L. J. Ex. 225; and see *Ex parte Hoare*, 23 L. T. 83.

(*m*) *The Queen v. Willmer and another*, 15 Q. B. 50.

(*n*) *Ex parte —*, 4 A. & E. 576, note (*a*); *Reg. v. Nottingham Journal Proprietors*, 9 Dowl. 1043; *Reg. v. Lawson*, 1 Q. B. 486; *Reg. v. Marshall*, 4 E. & B. 475; *Ex parte Pollard* (1901), 17 T. L. R. 773.

(*o*) *Rex v. Larrien*, 7 A. & E. 277; *Rex v. Hankey*, 1 Burr. 316; Lofft, 314; *Butt v. Jackson*, 10 Ir. L. R. 120 (T. T. 1846); *The Queen v. Kiernan*, 5 Ir. C. L. R. 171 (1855).

(*p*) *The King v. Miles*, Dougl. 271, 284.

CHAP. XXXII. the party libelled is abroad at a great distance (*q*); or where the libel is one reflecting on a public body of men (*r*). And a criminal information will not be granted unless the circumstances are such as to show that the relator not only has the object in view of clearing his character; but that he is also a proper person to be entrusted with it. And the relator should bring before the court all the circumstances, fully and candidly: and the rule or order will be discharged unless the relator has negatived specifically the charge made against him (*s*). Where it appeared that the relator had suppressed material facts which ought to have been brought before the court, and had misrepresented other facts, the court discharged the rule with costs (*t*).

Misrepresentation, or Suppression of facts.

The application must be made promptly.

A person alive to the vindication of his character must apply promptly. Any delay in making the application, that is not satisfactorily accounted for, will be ground for refusal by the court of a criminal information (*u*); and it is no sufficient excuse that the delay has arisen in consequence of hopes having been entertained that an amicable arrangement would be made (*x*).

As to the Affidavits.

On moving for a rule for leave to file a criminal information, the application must be accompanied by one or more affidavits, clearly and specifically stating the circumstances of the case (*y*), and showing—

Substance of.

1. That the publication complained of is libellous.
 2. Its application to the relator.
 3. A publication by the party against whom the application is made: and
 4. Exculpation, or denial of the charge by the relator:
- and, upon the whole, the affidavits must disclose a good *prima facie* case against the defendant, such as would justify a grand jury in finding a true bill: bearing in mind that no additional affidavits may be used without the leave of the court.

Title of and filing the Affidavits.

Affidavits to be used in applications on the Crown side must be intituled, "In the High Court of Justice, King's Bench Division" (*z*), and must be filed in the Crown Office Department of the Central Office of the High Court of Justice. And there must be indorsed on every affidavit a note showing on

(*q*) *Rex v. Haswell and another*, 1 Doug. 387.

(*r*) *Rex v. Williams*, 5 B. & Ald. 595.

(*s*) *Reg. v. Aunger*, 28 L. T. (N. S.) 630; 12 Cox, C. C. 407.

(*t*) 3 Burr. 1683.

(*u*) *Rex v. Murray*, 1 Jur. 37.

(*x*) *Reg. v. Hext*, 4 Jur. 339.

(*y*) *Prideaux v. Arthur*, Loft, 393.

(*z*) Crown Office Rules (1906), tit. "Affidavits," rr. 5—11.

whose behalf it is filed : and no affidavit can be filed or used without such note, unless the court or judge shall otherwise direct. CHAP. XXXII.

The affidavits must not be scandalous nor recriminatory. If they are (although the court will not always reject them on that ground) it will notice the statements as showing unfavourably to the relator ; and notwithstanding that he states a sufficient case for a criminal information, the court, in the exercise of its discretion on cause shown, will discharge the rule (a). And where a person who was challenged to fight a duel, applied for a criminal information, and in his affidavit in support of the application stated, " that the defendant had been dismissed from her Majesty's service under circumstances which would, in the opinion of officers and gentlemen, disentitle him to make any appeal to the laws of honour in a case where no offence was given " ; it was held, that by casting such imputations on the defendant, the applicant had shown that he was not a proper person to be entrusted by the court with a rule for a criminal information (b).

Scandalous or
Recriminatory
Affidavits.

On applying for an Order *nisi* for a criminal information, the applicant should take care that he has an affidavit sufficient for the purpose : for the court will not allow the application to be renewed upon amended affidavits ; or affidavits supplying defects in those used on a former application (c) ; unless leave to renew the motion was reserved ; or, except under very special circumstances ; such as where the rule has been discharged on reading affidavits which afterwards turned out to be based on perjury (d).

No renewed
application can
be made where
Order *nisi* has
been refused.

Where the libel is contained in a newspaper, the newspaper should be annexed to and filed with the affidavits and marked as an exhibit ; and it is essential that the rule, or order, should be drawn up on reading the newspaper. No rule or order can be discussed on documents to which it does not refer ; and the defendant must be apprised of what he has to answer, by seeing it on the files of the court. The Order *nisi* must be drawn up on reading evidence which is sufficient. Nothing can be referred to upon the reading of which the order does not appear to be drawn up (e).

As to the
Exhibits and
drawing up
the Order.

Upon motions founded upon affidavits, either party may

Rule as to
additional
Affidavits.

- (a) *The King v. Burn*, 7 A. & E. 49 ; *Ex parte Williams*, 5 Jur. 1133.
193.
(d) *R. v. Eve and Parlbry*, 5 A. &
(b) *Reg. v. Doherty*, 1 Arn. & Hodg. E. 780 ; 1 Nev. & Per. 229.
16.
(e) *Reg. v. Woolmer*, 12 A. & E. 422.
(c) *Reg. v. Franceys*, 2 Adol. & E.

CHAP. XXXII. apply to the court or a judge for leave to make additional affidavits, upon any new matter arising out of the affidavits of the opposite party; but no additional affidavits may be used except such leave has been first obtained (*f*).

Showing Cause against the Order nisi. On showing cause against the Order nisi, counsel on behalf of the defendant may rely on objections to the affidavits filed on behalf of the relator:—as for instance, that they are not duly sworn (*g*), that there is no proof of publication of the libel by the defendant (*h*). That it is not shown that the libel applies to the relator. That the relator has already sought his remedy elsewhere, as by application to the Lord Chancellor; by appeal to the public press in vindication of his character; or otherwise applied for redress at the hands of some other tribunal (*i*).

Non-residence in England. Non-residence in England, of an applicant for leave to file a criminal information for libel is a cogent argument against the application. And so, where the applicant was a foreigner, and was neither resident nor sojourning in this country, the court refused the application: but without laying down any rule that it would not, under any circumstances, give leave to file a criminal information on the application of a person so situated (*k*).

Information, requisites of. As to the technical mode of framing a criminal information for libel, the rules to be observed are similar to those which apply to the framing of an indictment; whatever certainty is required in the one, is also necessary in the other (*l*). The very words of the alleged libel must be fully set forth, with appropriate innuendoes where necessary. It will not be sufficient to state the libellous matter by way of recital (*m*).

Where published by several. Where several persons join in one act; as by singing libellous songs in the streets, reflecting on the relator and his family, they may all be joined in one information (*n*). But a joint information against several cannot be founded on distinct rules (or orders) absolute, for informations against each (*o*).

(*f*) Crown Office Rules, 1906, r. 9.

(*g*) *Rex v. Ipswich* (jailor), 2 Lord Ken. 421; *Rex v. Cockshaw*, 2 Nev. & Man. 378.

(*h*) *Reg. v. Stanger*, L. R. 6 Q. B. 352.

(*i*) *Reg. v. Marshall*, 4 E. & B. 475.

(*k*) *The Queen v. Labouchere*, 12 Q. B. D. 320; 53 L. J. 364; and see

per Denman, J., in the same, p. 331; and L. J. Rep. 369.

(*l*) 4 Burr. 2556.

(*m*) 3 Salk. 375; 1 Show. 337. As to other points, see the Crown Office Rules, 1906, and Form No. 30 therein.

(*n*) *Rex v. Benfield*, 2 Burr. 980.

(*o*) *Rex v. Heydon*, 3 Burr. 1270.

If the rule is made absolute to file a criminal information, CHAP. XXXII. before any process can be issued thereon, the relator must have given security, by recognizance, in the sum of £50, to prosecute the same with effect, and to abide by the orders of the court (*p*). The recognizance may be taken before the clerk of the Crown, or any justice of the peace of any county, city, franchise, or town corporate, where the cause of the information arose (*q*), or before the King's Coroner and Attorney, or master of the Crown Office (*r*). Security for Costs, &c.

After the information is prepared, and filed in the Crown Office, and the recognizance of the relator duly entered and filed as aforesaid, in accordance with the statute and rules above cited, the defendant, upon notice thereof, must enter, or cause to be entered, in a book at the Crown Office, an appearance to the information (*s*). Appearance, &c.

Where an information is filed, and the defendant is under terms to appear immediately, and does not enter an appearance, the prosecutor may serve a notice upon the defendant to appear within five days, and in default of appearance may move the court *ex parte* for leave to enter an appearance for him, or if the notice was personally served, for an attachment (*t*).

Every pleading other than a plea of guilty, or not guilty, to an indictment, information, or inquisition, must be intituled: "In the High Court of Justice, King's Bench Division," and dated of the day of the month and the year when the same was pleaded, and must bear no other time or date. It must be written or printed on paper, and a copy must be delivered to the opposite party, and be filed at the Crown Office (*u*). Pleading to the Information.

Every special plea or demurrer must be written or printed on paper, and if settled by counsel, signed by him; and if not so settled, must be signed by the solicitor, or the party if he defends in person (*x*). Special pleas and demurrers.

Similar pleas may be pleaded to a criminal information for libel, to those which may be pleaded to an indictment (*y*). And so, in addition to the plea of "not guilty," the defendant may plead the truth of the alleged libel, in the manner and form allowed by the Libel Act 1843 (*z*). But whatever plea is

(*p*) *Vide* C. O. R. 1906, r. 35.

(*q*) 4 & 5 Wm. & M. cap. 18.

(*r*) C. O. R. 1906, r. 35.

(*s*) C. O. R. 1906, r. 72.

(*t*) *Ibid.*, r. 79.

(*u*) C. O. R. 1906, r. 117, tit.

"Pleadings."

(*x*) *Ibid.*, r. 119.

(*y*) As to which, *vide infra*, p. 479.

(*z*) 6 & 7 Vict. c. 96, s. 6, *infra*, pp. 480, *et seq.*

CHAP. XXXII. pleaded, it must be entered at the Crown Office, and a copy thereof filed there.

Order to plead. An order to plead, reply, rejoin, join in demurrer or in error, or plead subsequent pleadings, in all prosecutions by way of . . . information, must be given, and such order may be drawn up and served as well during the sittings as in vacation ; and every such order will expire as follows, that is to say ; every order to plead, in ten days next after service thereof, unless the time be extended by order of the court or a judge ; and every order to reply, rejoin, join in demurrer or in error, or plead subsequent pleadings in eight days next after service thereof ; unless the time be extended as aforesaid (a).

Extension of time to plead. Time in which to plead may be extended, on application by summons to a judge at chambers, upon such terms and for such time, as the judge in his discretion may think fit (b).

Judgment on default of pleading. In case no plea, replication, rejoinder, joinder in demurrer, or other pleading (except joinder in error by the prosecutor), be entered within the time limited ; judgment, as for want of such pleading, may be entered at the opening of the office on the next following morning after the expiration of the time limited ; upon filing an affidavit of service of the order to plead, reply, &c., as the case may be ; unless an order of the court, or a judge, extending such time has been obtained and served ; in which case judgment will not be signed until the day after the expiration of the time granted by such order (c).

In some cases it may be advisable that a defendant should elect to suffer judgment by default : as for instance, where he has no substantial defence to the information ; or where there is no probability of his acquittal : for by so electing, he avoids the expenses attending a trial, and such a course may operate in mitigation of punishment on his being brought up to receive sentence.

Prosecutor's Costs on Criminal Informations. *As to costs in matters relating to criminal informations for libel.*

The statute of 4 & 5 Wm. & M. c. 18, though containing provision for defendant's costs on acquittal, and under certain other circumstances ; gives no power to award costs to the prosecutor in a proceeding by criminal information. And where the case is, at the request of the prosecutor, tried before

(a) C. O. R. 1906, r. 120.

(b) *Ibid.*, r. 122.

(c) *Ibid.*, 1906, r. 160.

a special jury, the judge has no power to certify so as to give the prosecutor the costs of such special jury (*d*). But under the Libel Act, 1843 (*e*) ; if upon a special plea of justification to a criminal information for libel, the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs he has sustained by reason of such plea ; such costs so to be recovered, to be taxed by the proper officer of the court before which the information is tried. The costs so taxed may be recovered by action at law (*f*). But the statute applies only to costs sustained by reason of the defendant's special plea, which do not therefore include the general costs of the prosecution, nor those relating to the motion for, and argument of, the order for leave to file the information. And, if there be no special plea of justification, then it appears that although the defendant be found guilty, or plead guilty, there is no authority under the Act to compel him to pay the costs of the prosecution.

CHAP. XXXII.
Costs under
the Libel Act.

It appears, however, that if the court on passing sentence impose a fine on the defendant, the prosecutor is entitled, under a writ of privy seal, to one-third part of the fine, towards his costs ; if they amount to so much ; and if not sufficient, he may memorialize the Lords of the Treasury to be allowed a further part of such fine towards the costs (*g*). The allocatur must be certified by the King's Coroner and Attorney : upon which the further allocatur of the judges must afterwards be obtained.

Part of the
Fine for libel
may be applied
towards prose-
cutor's costs.

When an information is filed by leave of the court, it is provided by statute 4 & 5 Wm. & M. c. 18, s. 2, that where the defendant is acquitted, or if a *nolle prosequi* be entered the court shall be authorised to award costs to the defendant, unless the judge shall at the trial, in open court, certify upon the record that there was no reasonable cause for exhibiting the information. But it has been held to be compulsory on the court to grant costs to the defendant in case of his acquittal, no certificate having been granted (*h*).

Defendant's
Costs in
proceedings
by Criminal
Information.

Where a rule *nisi* has been obtained for a criminal information, and upon showing cause the rule is discharged, it has been the practice that the party at whose instance the motion

Costs, where
Rule dis-
charged on
showing cause.

(*d*) *The King v. Abingdon*, 1 Esp. 229.

(*e*) 6 & 7 Vict. c. 96, s. 8.

(*f*) See *Richardson v. Wills*, 42 L. J. Ex. 15 and 68.

(*g*) *Vide* Corner's Cr. Pr. 126 : and

this applies to prosecutors of indictments for libel as well as criminal informations.

(*h*) *R. v. Woodfull*, 2 Str. 1131 ; Digest Law Lib. 98.

CHAP. XXXII. was made, should pay the costs (*i*). But this has been held to be discretionary with the court (*k*). Where an application for an information against a justice of the peace proved to be frivolous, the attorney, as well as the applicant, was ordered to pay the costs (*l*).

But the court will not award costs to be paid by the attorney prosecuting a rule for a criminal information, where no circumstance appears making him personally a party to such rule; although his conduct may have been such that the court would otherwise have entertained such an application against him (*m*).

Defendant's
costs on
default by
prosecutor.

If the prosecutor on any information, not *ex officio*, does not proceed to trial within a year after issue joined, or if he causes a *nolle prosequi* to be entered, or if the defendant be acquitted (unless the judge at the time of trial certifies that there was reasonable cause for the information), the court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information (*n*).

Defendant's
costs on
acquittal.

If on any indictment in the King's Bench Division, or information by a private prosecutor, for the publication of any defamatory libel, judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea (*o*).

Defendant's
costs where no
special plea.

If, on the trial of a criminal information for libel, the defendant be found "*Not Guilty*," he will be entitled to costs under the Libel Act, 1843, though he has not pleaded the special plea allowed by section 6 of that statute; and the judge has no power to certify to deprive him of costs; the provisions of the statute 4 & 5 Wm. & M. c. 18, s. 2, as to this, being superseded by the later Act (*p*).

And in case the relator shall not within three months after the costs are taxed, and demand made thereof, pay the same,

(*i*) See Kel. 61, pl. 8; 1 Doug. 314; 1 Burr. 563; 2 Burr. 787, 1162.

(*k*) *Vide The Queen v. Spurr and another, supra*, p. 450.

(*l*) *H. v. Fielding*, 2 Burr. 654; 2 Ld. Kenyon, 386.

(*m*) *The Queen v. Thomas and*

another, 7 A. & E. 608.

(*n*) C. O. R. 1906, r. 38; and *vide* 4 & 5 Wm. & M. c. 18, s. 2; also *The Queen v. Savile*, 18 Q. B. 703.

(*o*) C. O. R. 1906, r. 39.

(*p*) *The Queen v. Latimer, infra*.

then the defendant shall have the benefit of the said recognizance to compel them thereunto (*q*). And where, on the trial of an information for libel, the jury found a verdict for the defendant, but the judge certified that there was reasonable cause for exhibiting the information; the defendant afterwards obtained a side-bar rule for costs under the Libel Act (*r*): and it was held, that the defendant was entitled to costs under that act: and that, although by the former statute the judge was empowered to certify so as to deprive him of costs, no such power was given by the latter enactment (*s*).

The costs of showing cause against an order *nisi* for the filing of a criminal information for libel may be recovered of the prosecutor under the above section of the Libel Act, 1843, by a defendant who is found "Not Guilty," on the trial of the information (*t*). And no appeal lies against an order of the King's Bench Division, upholding the Master's allowance of such costs on taxation (*u*).

The Libel Act, 1843, (s. 8,) as to costs, does not apply to informations filed *ex officio* by the Attorney-General; but only to those filed by order of the court, on the relation of a private prosecutor, and to indictments for libel (*x*). And where the information purported to be filed by the Queen's Coroner, without stating "at the instance of A. B.," &c., the Court of Queen's Bench in Ireland refused after verdict of "Not Guilty," to alter or amend the information by inserting the name of the private prosecutor; but held, that the defendant was entitled to tax his costs against such private prosecutor notwithstanding (*y*).

(*q*) 4 & 5 Wm. & M. c. 18, s. 2.

(*r*) 6 & 7 Vict. c. 96, s. 8.

(*s*) *The Queen v. Latimer*, 15 Q. B. 1080; 20 L. J. 129.

(*t*) *The Queen v. Steel and others*, 1 Q. B. D. 482; 45 L. J. 391. It has been held by the Court of Queen's Bench in Ireland, that a defendant, under such circumstances, is only entitled to the costs incurred subsequently to the filing of the informa-

tion; *Reg. v. Curkendish*, 12 Ir. L. R. 230. But this decision was not followed by the judges of the Q. B. D. in England.

(*u*) *Ibid.*, 2 Q. B. D. 27; 46 L. J. M. C. 1.

(*x*) See *The Queen v. Duffy*, 9 Ir. L. R. 329.

(*y*) *Reg. v. Curkendish*, 11 Ir. L. R. 511.

Costs of showing cause, allowed to defendant after verdict of Not Guilty.

CHAPTER XXXIII.

PROCEEDINGS BY INDICTMENT ; AND SUMMARY
JURISDICTION OF JUSTICES AS TO LIBELS.*Preliminary procedure prior to Indictment.**Order of Judge required for prosecution of Newspaper proprietor, &c.**Summary Jurisdiction as to trivial libels in Newspapers.**Jurisdiction of Justices to require sureties for good behaviour.**Jurisdiction of Justices to issue warrant of arrest in libel.**Seizure of libellous papers.**Libels indictable at Common Law.**When a libel may be indictable, though not actionable.**Libels indictable by statute.**Accessories to the publication of a libel.**Libels on a class or body.**Conditions under which indictments for libel may be preferred.**Mode of framing indictment for libel.**Statement of the defamatory matter.**Innuendoes, when necessary.**When the intention of the publication should be alleged.**Objections to indictment, when, and how to be taken.**Crown Office Rules as to pleadings.**Statutory plea of truth, when available as a justification to indictment.**Manner of pleading the statutory plea.**Truth no justification, when.*CHAPTER
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under which
Indictments
for libel may
be preferred.

Preliminary Proceedings.—It will now be necessary to state the conditions under which Indictments for libel may be preferred. It will be seen, that with one or two exceptions only, no such indictment can now be preferred, unless there has been a preliminary investigation of the charge before a justice of the peace, or a committal for trial of the person charged.

By the 4 & 5 Wm. IV. c. 36 (a), s. 13, no bill of indictment for any misdemeanour (other than perjury or subornation of perjury) which can or may be presented to the grand jury at any sessions of the peace for the city of Westminster and borough of Southwark, and counties of Middlesex, Essex, Kent, and Surrey, respectively, in which such misdemeanour was committed, shall be presented to the grand jury to be summoned under the authority of this Act, unless the prosecutor, or other person presenting such indictment, shall have been bound by recognizance to prosecute or give evidence; or unless the accused shall have been committed to or detained in custody, or bound by recognizance to appear at the said sessions. It was formerly held that, notwithstanding this

(a) An Act for establishing a court for the trial of offences committed in the Metropolis and parts adjoining.

section, it was not necessary for the purpose of giving jurisdiction at the Central Criminal Court, in a prosecution for libel, that the prosecutor should have entered into recognizance to prosecute: or that the defendant should have been in custody or been bound over to appear (*b*). And the Act for preventing vexatious indictments for certain misdemeanours, did not include the offence of libel within its provisions (*c*).

But, by the Newspaper Libel and Registration Act, 1881 (*d*), every libel, or alleged libel, and every offence under that Act, is to be deemed to be an offence within and subject to the provisions of the Act of 22 & 23 Vict. c. 17, intituled "An Act to prevent vexatious indictments for certain misdemeanours."

Vexatious
Indictments
Act made
applicable to
libels.

It will be observed, that the section applies to all libels, whether published in a newspaper or otherwise. But the previous sections are restricted to libels published by certain persons, in newspapers.

Prior to the Act of 1881, an indictment for a libel might always be preferred at assizes, and courts of oyer and terminer, notwithstanding that there had been no previous investigation of the charge before a justice of the peace; or, having been such, the magistrate refused to send the case for trial, or to bind any person by recognizances to prosecute; as libel was not included in the offences named in the Vexatious Indictments Act. But now, an indictment for the publication of a libel cannot be preferred unless there has been a preliminary investigation of the charge before a magistrate or justice of the peace, and the prosecutor or other person bound by recognizance to prosecute or to give evidence; or unless the accused has been committed, or bound by recognizance to appear to answer to an indictment for the offence; or unless the indictment be preferred by direction, in writing, of a judge of a superior court, or of the Attorney or Solicitor-General (*e*).

Where a person is charged with the offence of publishing a libel, if after the evidence is given the same is not, in the opinion of the justice or justices, sufficient to put the accused upon his trial, he must be discharged; but if in the opinion of the justice or justices such evidence is sufficient, or raises a strong or probable presumption of guilt, then such justice or justices must, instead of committing the accused to prison,

Preliminary
proceedings
before Justices
prior to Indict-
ment.

(*b*) *Reg. v. Gregory*, 7 Q. B. 274;
14 L. J. M. C. 82.

(*c*) 22 & 23 Vict. cap. 17.

(*d*) 44 & 45 Vict. c. 60, s. 6.

(*e*) See the Vexatious Indictments
Act, 22 & 23 Vict. c. 17, made appli-
cable to libel by 44 & 45 Vict. c. 60,
s. 6.

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Justices must accept responsible bail.

Mandamus to Justices if they decline jurisdiction.

Proceeding where Justice refuses to send for trial.

admit him to bail or bind him over by recognizance, to surrender and take his trial for the offence charged. And this applies to all charges of libel, whether defamatory, obscene, or seditious. And where parties are apprehended and charged before justices with using seditious language; they may be required to find bail for their appearance to take their trial for the offence, and to be of good behaviour in the meantime: and justices cannot refuse to accept responsible bail; and will not be justified in any unreasonable detention of the accused in prison. And where justices act oppressively, and refuse to accept substantial bail, they will be liable to prosecution by indictment, or by criminal information (*f*).

Although magistrates have a discretionary jurisdiction as to issuing a summons after hearing the complaint, such discretion is a judicial discretion, and must be exercised in a legal and proper manner, upon the facts appearing in evidence before them; and not upon any extraneous matter apart from the evidence (*g*). If, on a preliminary investigation before a magistrate, the matter charged as libellous appears to the magistrate to be of a grossly defamatory nature, or such as has a tendency to provoke a breach of the peace; then, if a *prima facie* case of publication be made out, it is the duty of the magistrate, after hearing the evidence, either to hold the accused to bail, or to bind him by recognizance to appear to answer to an indictment for the offence; for a person who has been libelled is entitled to such protection as the law affords, and the magistrate has no right to decline jurisdiction by refusing to commit, on the ground that the prosecutor has his remedy by action at law, or that the matter is more fitting for a civil tribunal than for the exercise of criminal jurisdiction; and the magistrate, in such case, may be compelled by mandamus, to hear and determine the case. But it is only where the magistrate declines to exercise the jurisdiction with which he is invested, that the court will interfere by mandamus.

By section 2 of the Vexatious Indictments Act (*h*) (now made applicable to the offence of libel) (*i*), where any charge or

(*f*) See *The Queen v. Badger and another*, 12 L. J. (N. S.) M. C. 66.

(*g*) *Vide The Queen v. Adamson and others* (justices, &c.), 45 L. J. M. C. 46.

(*h*) 22 & 23 Vict. c. 17.

(*i*) 44 & 45 Vict. c. 60, s. 6. It

should be observed that this section of the "Newspaper Libel and Registration Act, 1881," applies to all libels, whether published in a newspaper or otherwise. The other sections of that Act apply exclusively to libels

complaint is made before one or more justices of the peace that any person has committed any of the offences therein mentioned (libel now included) within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same; then in case the prosecutor shall desire to prefer an indictment respecting the said offence, the said justice is required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the court in which such indictment ought to be preferred; in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

A married woman cannot prosecute her husband for the publication of a personal libel upon her. And the 12th section of the Married Women's Property Act, 1882, giving a woman the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if she were a feme sole, does not enable a woman to take criminal proceedings against her husband for a personal libel upon her (*k*).

By the Law of Libel Amendment Act, 1888 (*l*), no criminal prosecution can now be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the Order of a judge at Chambers being first had and obtained (*m*).

Such application must be made on notice to the person accused, who is thereby to have an opportunity of being heard against such application (*n*).

The object of the enactment is to prevent frivolous and vexatious prosecutions for libel, against the proprietors and others responsible for the publication of newspapers. It does not apply to the procedure by criminal information for libel,

published by the proprietor and others responsible for the publication of the newspaper.

(*k*) *The Queen v. The Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. M. C. 118.

(*l*) 51 & 52 Vict. c. 64, s. 8.

(*m*) This statute repeals the 3rd section of the "Newspaper Libel and Registration Act, 1881," which re-

quired the fiat of the Director of Public Prosecutions in England, or H.M. Attorney-General in Ireland, to be obtained before any such prosecution could be commenced. The new statute has substituted for such fiat, an "Order of a Judge at Chambers," as above stated.

(*n*) 51 & 52 Vict. c. 64, s. 8.

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whether the information be filed *ex officio* by the Attorney-General, or by the Queen's coroner and attorney by leave of the court. Nor to indictments for libel preferred by the direction, or with the consent in writing, of a judge of the Supreme Court (o). But it applies to proceedings in courts of summary jurisdiction, against any proprietor, publisher, editor, or person responsible for the publication of a newspaper, for any libel published in such newspaper. And accordingly, before a magistrate is justified in issuing a summons, or in allowing a charge of libel to be preferred against any such person, it is his duty to require the production of a judge's order, in accordance with the statute above mentioned. But in cases not falling within the terms of the statute, no such order can be required.

The granting of the order is discretionary with the judge at Chambers. Under the repealed section, it was held, that where the Director of Public Prosecutions in England had refused to grant his fiat, for a criminal prosecution against the proprietor or publisher of a newspaper for a libel published therein, the High Court of Justice had no power to interfere by mandamus or otherwise to compel him to issue his fiat (p). And no appeal will lie from an Order made by a judge at Chambers under s. 8 of the statute (51 & 52 Vict. c. 64) (q).

Proprietor of
Newspaper,
who ?

The word "proprietor" means and includes as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship, the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper, as between themselves and the persons in like manner representing or responsible for the other shares or interests therein; and no other person (r).

It seems doubtful, however, if a prosecution for libel could be sustained against the signatories to the articles of association of a newspaper company: at all events not unless it is proved that they knew of, or authorised, the publication of the libel (s).

(o) *The Queen v. Yates*, 11 Q. B. D. 750; 52 L. J. 778; affirmed on appeal, 14 Q. B. D. 648; 54 L. J. 258.

(p) *Ex parte Hubert & Co.*, 15 Cox, C. C. 166, per Pollock, B., and Manisty, J.

(q) *Ex parte Pulbrook* [1892], 1

Q. B. 86; 61 L. J. M. C. 91.

(r) 44 & 45 Vict. c. 60, s. 1.

(s) *Vide Reg. v. Allison and others*, 16 Cox, C. C. 559; 59 L. T. 933; S. C. nom. *Reg. v. Judd and others*, 37 W. R. 143.

It has been held, that s. 3 (now repealed) of the Newspaper Libel and Registration Act, 1881, did not authorize the granting of a fiat against the *printer* of a newspaper: nor against the directors of a general printing company, who printed the newspaper containing the libel (*t*).

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Printers of
Newspaper, no
fiat against.

As to the reception of evidence of the truth of the libellous matter, on a preliminary investigation before a magistrate; by a technical construction of the 4th and 5th sections of the Libel Act, 1843 (*u*), such evidence was receivable when the charge was preferred under the 4th section of that Act, but not when under the 5th. And so, where the charge was preferred under the 5th section, for "maliciously publishing a defamatory libel"; it was held, that the committing magistrate had no jurisdiction to receive evidence to prove the truth of the alleged libel, either by cross-examination of the complainant's witnesses, or by the testimony of witnesses called on behalf of the accused; and this, notwithstanding that, although the defendant was only charged under the 5th section, he might be indicted under the 4th; for, it was said, the truth was not in issue before the magistrate, on a charge under the 5th section, and a defence founded upon the truth of the alleged libel, was available only at the trial, on a plea framed under the 6th section of the statute (*x*). And where, on the trial of an indictment for perjury, founded upon evidence received on behalf of the defendant, on the hearing before justices, as to the truth of an alleged libel; it was ruled that, the charge having been preferred under the 5th section of the Act, the justices had no jurisdiction to receive such evidence; consequently a charge of perjury founded upon it could not be supported (*y*). But where the charge was under the 4th section of the same statute, for "maliciously publishing a defamatory libel, *knowing the same to be false*," evidence on behalf of the defendant as to the truth of the alleged libel was held to be admissible on the preliminary investigation before the magistrate (*z*).

Evidence as to
truth, &c., of
libel, before
committal by
Justices.

This anomalous construction of the statute has now been removed to a certain extent, by a clause in the Newspaper

(*t*) *Ibid.*

(*u*) 6 & 7 Vict. c. 96.

(*x*) *The Queen v. Carden*, 5 Q. B. D. 1; 49 L. J. M. C. 1; *Reg. v. Flowers*, 44 J. P. 377.

(*y*) *Reg. v. Townsend*, 4 F. & F.

1089; 10 Cox, C. C. 356, per Montagu Smith, J., after consulting Mellor, J.

(*z*) *Ex parte Ellissen v. The Lord Mayor of London*, Q. B. Mich. T. 1868, MS.

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Evidence now
receivable as
to truth of
libel, public
benefit, &c.

Libel and Registration Act, 1881 (*a*). By which it is enacted that, a court of summary jurisdiction, upon the hearing of a charge against the proprietor, publisher, or editor or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit; and as to the matters charged in the libel being true; and as to the report being fair and accurate, and published without malice; and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence, by the person charged, on his trial on indictment; and the court, if of opinion, after hearing such evidence, that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

But only in
certain cases.

But this section, it will be seen, only applies to the case of a proprietor, publisher, or editor, or person responsible for the publication of the newspaper containing the libel: and would not, therefore, apply to any libel published otherwise than in a newspaper: nor, as it appears, to the writer or person who sent the libel to the newspaper for publication, such writer not being either proprietor, publisher, or editor, or person responsible for the publication of the newspaper. The cases of *The Queen v. Carden*, *The Queen v. Townsend*, and *Ellissen v. The Lord Mayor of London* (*b*), are, therefore, still law in cases not within the Newspaper Libel Act, 1881.

Such evidence
inadmissible in
blasphemous,
obscene, or
seditious libels.

And in the case of blasphemous, or obscene libels, though published in a newspaper, it is obvious that a magistrate would not be justified in receiving such evidence, for the truth thereof would be no defence, and it could not possibly be for the public benefit that such matters should be published. And so it has been expressly held by the Court of Queen's Bench in Ireland that the section (*c*) does not enable a party charged with the publication of a seditious libel to give evidence, at a preliminary investigation before a magistrate, of the truth of the libel; nor that its publication was for the public benefit (*d*). And accordingly an application for a mandamus to compel the magistrate to receive such evidence was refused (*e*).

Summary
jurisdiction to
convict and
fine for trivial
libels in
Newspapers.

By the Newspaper Libel and Registration Act, 1881 (*f*),

- (*a*) 44 & 45 Vict. c. 60, s. 4.
- (*b*) *Supra*.
- (*c*) *I.e.*, sec. 4 of the Newspaper Libel Act, 1881.
- (*d*) *Ex parte O'Brien*, L. R. (Ir.) 12

Q. B. 29; and see *The Queen v. Duffy*, *infra*, p. 482.

(*e*) *Ibid*.

(*f*) 44 & 45 Vict. c. 60, s. 5.

justices have summary jurisdiction to convict and fine certain offenders for the publication of libels in a newspaper, if the libel is of a trivial character; unless such offenders desire to be tried by a jury.

It will be observed that the jurisdiction given by this section applies only to charges against a proprietor, publisher, editor, or person responsible for the publication of the newspaper containing the libel. And therefore, where the libel is published in a book, pamphlet, placard, letter, or other form, the statute does not apply.

In order to sustain a conviction under the statute, it must be proved that the matter charged as libellous was published by the defendant; or that the defendant was party or privy to the publication thereof: and the very words of the libel must be set out in the conviction (*g*): except in the case of an obscene libel, in which case the obscene passages need not be set out (*h*).

The expression "a court of summary jurisdiction" has, in England, the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland, means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

What a Court
of Summary
Jurisdiction.

The expression "Summary Jurisdiction Acts" has, as regards England, the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland, means within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same (*i*).

Where the libel is in the form of a letter containing a direct challenge to fight, security for the good behaviour should be required by justices under the Summary Jurisdiction Acts: and so also as regards a verbal challenge to fight; as such communications, whether verbal or written, directly tend to acts of personal violence.

Letter con-
taining chal-
lenge to fight.

And in a case prior to the statute of 1881, where the plaintiff was charged before the defendant (a justice of the peace), with having written on the pavements in a certain lane, offensive

Jurisdiction of
justices in
default of
Sureties to
commit to
prison.

(*g*) *Vide The Queen v. Bradlaugh and another*, 3 Q. B. D. 509, 607; 48 L. J. M. C. 5; and *vide also Rex v. Sparling*, 1 Str. 497.

vide infra, p. 477.

(*i*) 44 & 45 Vict. 60, s. 17; and see "The Summary Jurisdiction Act, 1881" (47 & 48 Vict. c. 43), sec. 7.

(*h*) 51 & 52 Vict. c. 64, s. 7; and

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words reflecting on the character of a railway station-master; and it having been proved upon oath before the defendant, that the continued writing for some time past of the same offensive words was calculated to provoke a breach of the peace, the defendant ordered and adjudged that the plaintiff do enter into his own recognizance, with two sureties, to keep the peace for three months; and the plaintiff having refused to enter into such recognizance, the defendant committed him to prison for three months, unless he should in the meantime enter into such recognizance. In an action for false imprisonment against the defendant; it was held, that a justice of the peace has jurisdiction to require sureties for the good behaviour of a person charged before him, upon information, with having published a libel calculated to provoke a breach of the peace; and in default of such sureties to commit the party so charged to prison (*k*).

Publishers and Distributors of seditious Libels may be arrested.

As to the publishers and distributors of impious and seditious libels, they may be immediately apprehended and held to bail. "It is not necessary to stand by and see the mischief spreading without attempting to intercept its progress: it would be a reproach to the laws of the country if it were so, and if the magistrates might not arrest the torch in the incendiary's hand, and before it had set fire to the building" (*l*).

Seizure of Libellous Papers.

With respect to the seizure of libellous papers, it is said to have been resolved, in the reign of Charles II., by all the judges, that where persons write, print, or sell any pamphlet, scandalizing the public, or private persons, such books may be seized, and the person punished by law (*m*).

Search warrants in case of seditious Libels.

In *Leach's case* (*n*) the warrant from the Secretary of State was couched in the following terms: "These are, in his Majesty's name, to authorize and require you (the messengers), taking a constable to your assistance, to make a strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled 'The North Briton,' No. 45, and them, or any of them, having found, to apprehend and seize, together with their papers, and bring in safe custody before me to be examined concerning the premises, and further dealt with according to law." The messengers,

(*k*) *Haylock v. Sparke*, 1 E. & B. 471; 22 L. J. M. C. 67.

(*l*) Per Leycester, J., in his charge to the jury, Carnarvon Summer Ass. 1819; and see *Butt v. Conant*, 1 Brod.

& Bing, 548; 4 Moore, 195.

(*m*) 4 Read. St. Law, 154.

(*n*) 11 St. Tr. 307; 19 How. St. Tr. 1002.

under this warrant, seized Mr. Leach and imprisoned him for some time; but on its being found that he was neither author, printer, nor publisher, he was discharged by the Earl of Egremont's order, without even having appeared before him. After a verdict for the plaintiff, in an action for false imprisonment against the King's messengers, the defendants carried the matter, by a bill of exceptions, to the Court of King's Bench; when the single point decided was, that the defendants could not justify, inasmuch as they had not acted in obedience to the warrant (*o*). A warrant was issued in the name of the Duke of Newcastle, one of the Secretaries of State, directed to two of the king's messengers, requiring them, taking a constable, to make a diligent search in the house of *Dr. Earbury* (*p*), the author of a treasonable paper, entitled "The Royal Oak Journal," for all papers of whatsoever kind in his custody, and to bring the said papers before him; the messengers, without taking a constable to their assistance, entered the defendant's house, seized his papers, and brought them before Mr. De La Faye, who was the Duke's secretary, and a justice of the peace. The defendant afterwards applied to the Court of King's Bench to have his papers restored to him, insisting that a Secretary of State could not legally grant a warrant to seize a person's papers. Lord Hardwicke, C.J., said, that as to seizing the defendant's papers he would not give any opinion whether it was legal or not, that the Court of King's Bench could not grant a rule upon the messenger who did seize them, to restore them; and therefore, that the question was not properly before the court for their determination. But in the great case (*q*) of the seizure of papers, it was decided, that a Secretary's warrant to search for papers was illegal; and Lord Camden, C.J., observed, "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge or even suspect a person to be the author, printer, or publisher of a seditious libel." "There is no authority to show that libels might be seized,

Search warrant
of Secretary of
State held
illegal.

. (*o*) By a resolution of the House of Commons it was declared, that general warrants in the case of libel are illegal. Journ. Ho. Com., 22 April, 1766. And such were, by a subsequent resolution, declared to be illegal

in all cases. *Ibid.*, 25 April, 1766.

(*p*) *The King v. Earbury*, 2 Barnard. K. B. 546; Digest Law Lib. 33.

(*q*) *Entick v. Carrington and others*, 11 St. Tr. 317; 19 Howell's St. Tr. 1029.

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except the opinion of the twelve judges at the close of the reign of Charles II., who gave it as their opinion that no one could legally expose to the public anything that concerned the affairs of the public, without licence from the King. This was quoted by Scroggs, C.J., on the trial of Harris for a libel, who extended the doctrine to the seizure of all books, pamphlets, and writings on matters of public concern" (r). "Upon the whole, we are of opinion that the warrant to seize and carry away the parties' papers in case of a seditious libel, is illegal and void." And the House of Commons (s) afterwards came to a resolution declaring the seizure of papers, in case of libel, to be illegal.

As to the seizure of obscene books, pictures, prints, &c., summary powers are given to justices, by statute, to give authority, by special warrant, to any constable or police officer, to enter any house, &c., to search for and seize such (t).

Libels indict-
able at
Common Law.

As to Proceedings by Indictment.—As a general rule, all libels on individuals are *prima facie* indictable: for the publication, without lawful justification, of matter (whether true or false) defamatory of another, has a tendency to create ill-blood, and to provoke the person defamed to avenge the injury by an attack on the libeller. It has therefore been long established by law, that libel is a public offence for which a remedy is given by indictment at common law.

When a libel
may be indict-
able though
not actionable.

And it has been held that where a party may be indicted for any written defamation, an action may also be maintained at the suit of the party injured (u). But this is not strictly accurate. According to more recent authorities, where an action will lie for libel, there (generally) an indictment will also lie. But the converse will not hold (x). An indictment will lie in some cases where an action will not; as in those cases where the only publication is to the party libelled, an indictment will lie; but no action can be sustained; the primary ingredient to sustain it being wanting: (viz.)—publication by the defendant to a *third* party. So also in some cases where the libel is true; proof that it is true is an answer to an action at law; but not so to an indictment, unless it was for the public benefit that the libellous matter should be published; in which

(r) *Ibid.*, 19 How. St. Tr. 1070–1.

(s) Journ. Ho. Com., 25th April, 1766.

(t) See 20 & 21 Vict. c. 83, *supra*, p. 367.

(u) Skin. 123; 2 Wils. 204; 4 Com.

Dig. tit. Libel, C. 3; 7 Bac. Ab. tit. "Slander," 255; 3 Blac. Com. 125; 2 Brownl. 151.

(x) 3 Mod. 139; Com. Dig. tit. "Libel," A. 2.

case such a defence must be specially pleaded in accordance with the Libel Act, 1843 (*y*). In no other case is the truth of the libel any defence to an indictment.

A party proceeding by indictment for libel, is not thereby deprived of his remedy by action-at-law; but in the case of a criminal information being granted, the applicant must waive his right of action, if so required by the court (*z*). But the proceeding by indictment is no waiver of such right. The prosecutor may indict for the public offence, and sue for damages for the defamation of his character (*a*).

An indictment will not lie for mere words not reduced into writing (*b*), unless they be seditious, blasphemous, grossly immoral, or addressed to a magistrate in the execution of his office; or uttered as a challenge to fight a duel, or with an intention to provoke another to send a challenge (*c*).

But verbal accusations, or threats to accuse a person of crime, with intent to extort money or other property, are indictable by statute as felony (*d*).

Any defamatory libel, published maliciously, is indictable by statute (*e*), as well as at common law. And if published "knowing the same to be false," the statutory punishment on conviction is more exemplary (*f*).

It is a misdemeanour at common law, to publish a defamatory libel, whether false or not: and therefore, on an indictment charging the defendant with publishing a defamatory libel "knowing the same to be false," he may be convicted of the lesser offence of publishing a defamatory libel; though the jury negative the *scienter* of the defendant (*g*).

But where the commitment charges an offence only under section 5, the defendant cannot be indicted under section 4 (except under the conditions stated in the Vexatious Indictments Act); and therefore, if in such a case, the indictment charges an offence under both sections, it is bad; unless amended by striking out the charge under section 4 (*h*). It

(*y*) 6 & 7 Vict. c. 96, s. 6.

(*z*) *Supra*, p. 453.

(*a*) 2 Wils. 204; 4 Com. Dig. tit. Libel, C. 3; 3 Blac. Com. 125; 7 Bac. Abr. tit. Slander, 255; Skin. 123; 2 Brownl. 151; and *vide* 4 Q. B. D. 42; 48 L. J. Q. B. 113.

(*b*) 2 Salk. 417; *R. v. Langley*, 6 Mod. 125.

(*c*) *R. v. Philipps*, 6 East, 464.

(*d*) 24 & 25 Vict. c. 46, s. 47.

(*e*) 6 & 7 Vict. c. 96, s. 5.

(*f*) *Ibid.*, sec. 4.

(*g*) *Boulter v. The Queen*, 21 Q. B. D. 284; 57 L. J. M. C. 85.

(*h*) *Vide* 44 & 45 Vict. c. 60, s. 6; and *Reg. v. Felbermann and another*, 51 J. P. 168; and see *Boulter v. Holder and others*, 54 L. T. 298; 51 J. P. 277.

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Publishing, or threatening to publish a libel, or proposing to abstain from publishing anything, with intent to extort money, &c.

will, however, be too late to raise an objection by writ of error after conviction, that as to one of the counts the requirements of the Vexatious Indictments Act have not been complied with (*i*). Such an objection, to be available, should be taken at the trial, by motion to quash the indictment (*i*).

It is also an indictable offence, to threaten to publish defamatory matter, with intent to extort money, &c. (*k*).

So that whether a libel or not, if the threat to publish, or proposal to abstain from publishing, be with intent to extort money or goods, or security for money, or any valuable thing, or with intent to induce any person to procure for another an office of profit, etc., the offence will be complete (*l*). But it has been ruled that a count under this section, charging the defendants with unlawfully offering to prevent the publishing, and with threatening to publish certain matters touching the prosecutor, with intent to extort money, cannot be supported by evidence of an attempt to obtain the money by inducing the prosecutor to believe that an information would be laid against him by one G. for an offence relating to the post-horse duties, and that the defendants had the means of preventing the proceedings, and would prevent them on being paid a pound or two (*m*).

Accessories to the publication of a libel.

All who are accessories to the publication of a libel, are liable to be indicted as principals: for according to the general rule of law, in misdemeanours all accessories are principals (*n*). And therefore all who are in any degree accessory to the publication of a libel, or who are in any way concerned in the composition, writing, or printing thereof, with a view to publication, and all who by any means conduce to the publication, are considered in law as principals in the act of publication, and liable to be indicted as such (*o*). And a person residing out of the jurisdiction may be indicted for the publication of a libel within the jurisdiction, though he be only an accessory to such publication (*p*).

Defendant residing out of jurisdiction.

Corporation, liability of, for the publication of a libel.

A corporation may be liable to an indictment for libel (*q*) not only in their collective or corporate capacity when the

(*i*) *Boulter v. The Queen*, 57 L. J. M. C. 85; 16 Cox, C. C. 488.

(*k*) 6 & 7 Vict. c. 96, s. 3.

(*l*) *Reg. v. Coghlan*, 4 F. & F. 316, per Bramwell, B.

(*m*) *Reg. v. Yates and another*, 6 Cox, C. C. 441, per Crompton, J.

(*n*) See *The Queen v. Greenwood*, 2

Den. C. C. 453.

(*o*) *R. v. Benfield*, 2 Burr. 983, pl. 3.

(*p*) *Rex v. Johnson*, 6 East, 583; 7 East, 65.

(*q*) As to the process against a body corporate to compel appearance to an indictment, see the C. O. 2 R. 1906, r. 87.

libel has been so published, but also in their individual capacity (r).

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An indictment for a libel on several persons, to the jurors unknown, is bad (s); but a libel upon one of a body of persons, without naming him, is a libel upon the whole, and may be so described. And, accordingly, where a libel was published of an *East India Director*, but without naming any director in particular; it was held, to be equally applicable to everyone of the directors of the East India Company; and the court made a rule absolute for a criminal information against the defendant for printing and publishing a libel on the Directors of the East India Company (t).

Libels on a
Class or body.

An indictment for libel may be removed by *certiorari* into the King's Bench Division (u), or to the Central Criminal Court (x), if good cause be shown for such removal. And any indictment for libel found by the grand jury at the Central Criminal Court, may also, by the same process, be removed into the King's Bench Division (y). But where the indictment was for the publication of a blasphemous libel, by a bookseller at Manchester, the court refused to remove it, as it was not alleged that the defendant could not have a fair trial at the Salford Sessions, nor that difficult points of law were likely to arise at the trial (z).

Removal of
Indictment by
Certiorari.

The proceedings relating to the application for, and removal of indictments by *certiorari* are now regulated by the Crown Office Rules, 1906 (a).

As to the technical mode of framing an indictment for libel, a few observations, supported by authorities on the subject, may here be useful.

Mode of
framing indictment for libel.

Since a criminal proceeding is in its nature local, the offence must be laid, and proved to have been committed, in the county within which the bill is preferred (b).

Venue.

But if a person write a libel in one county and publish it in another, he may be indicted in either county (c). And if a

(r) *Vide Rex v. Watson*, 2 T. R. 199; also *supra*, p. 231; and see an American case to same effect, *State v. Atchison*, 3 Lea, 729; 31 Am. Rep. 663.

(s) *Rex v. Orme (or Alme) and Nott*, *Ld. Ray.* 486; 3 Salk. 224.

(t) *The King v. Jenpur*, 7 Mod. 400; and *vide The King v. Hatchard*, *infra*, p. 493.

(u) 5 B. & Adol. 354.

(x) 19 & 20 Vict. c. 16, s. 1.

(y) *Reg. v. Gregory*, 7 Q. B. 274.

(z) *Reg. v. Heywood*, 4 Jur. 413.

(a) Rules 28 to 42.

(b) 4 Read. St. Law, 155; 8 Mod. 328; Digest Law of Libels, 97.

(c) *R. v. Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

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As to what
are Necessary
Allegations.

Of and con-
cerning the
Complainant.

"Unlawfully"
and
"maliciously."

Statement of
the Defamatory
matter.

person in Ireland procure the publication of a libel in Middlesex, he may be indicted in Middlesex (*d*).

The indictment must charge the defendant with *publishing* the libel. It appears that the composing or writing a libel merely, without any kind of publication, is not an offence, unless the libel be afterwards made known (*e*). And it should be alleged to have been published of and concerning the prosecutor or person libelled ; unless it sufficiently appears from the libel itself that he was the person referred to. If the indictment state merely that the libel was published to defame and vilify the complainant, and to bring him into disgrace, it will not be sufficient (*f*).

Where an indictment charged the defendant, under the Libel Act, 1843 (*g*), s. 5, with "unlawfully" publishing a defamatory libel, but omitted to aver that it was published "maliciously" ; it was held, that the section did not create or define an offence, but merely enjoined the punishment to be awarded to an existing common law offence ; that at common law an averment of malice was unnecessary, and the indictment was therefore good (*h*). And it appears, that if an averment of malice had been necessary, the defect was cured by verdict (*i*).

The libellous matter must be set out in the indictment, and care should be taken to state it correctly ; with all such averments and innuendoes as may be necessary to render it intelligible, and its application to the party libelled, clear and unequivocal (*k*). In every indictment the offence, and the facts constituting the offence, must be stated ; and where those facts consist of words charged as libellous, the very words complained of must be set forth ; otherwise the indictment will be bad. And whatever reasons can be given for setting out the very words of defamatory libels, the same are equally applicable to the case of blasphemous or seditious libels (*l*). And where the libel is contained in a book, such parts of the book as are charged to be libellous must be set out in the indictment. But where the libel consists of a picture or caricature, it must be fully and particularly described, and its defamatory

(*d*) *R. v. Johnson*, 7 East, 68.

(*e*) *R. v. Burdett*, 4 B. & Ald. 95.

(*f*) *R. v. Marsden*, 4 M. & S. 164 ;
and see *Clement v. Fisher*, 7 B. & C.
459 ; 1 M. & R. 281.

(*g*) 6 & 7 Vict. c. 96.

(*h*) *The Queen v. Munslow* [1895],

1 Q. B. 758 ; 64 L. J. M. C. 138.

(*i*) *Ibid.*

(*k*) See *Sucheverell's case*, 5 St. Tr.
828 ; 15 How. St. Tr. 466.

(*l*) *Reg. v. Fussell*, 3 Cox, C. C.
291.

nature or tendency must appear from the description thereof in the indictment (*m*).

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In an indictment for publishing an obscene book, the law was, until recently, that the words alleged to be obscene, must be set out in full; and that the omission to so set them out was a defect which could not be cured by verdict (*n*).

Obscene
matter;

But since the "Law of Libel Amendment Act, 1888," (*o*), it has been no longer necessary to set out in any indictment, or other judicial proceeding, instituted against the publisher of any obscene libel, the obscene passages; it being sufficient to deposit the book, newspaper, or other documents containing the alleged libel, with the indictment, or other judicial proceeding; together with particulars showing precisely by reference to pages, columns, and lines, in what part of the book, newspaper, or other document the alleged libel is to be found; and such particulars will be deemed to form part of the record; and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or other judicial proceeding (*p*).

need not be
set forth in
indictment.

It is not necessary to allege that the matter published is false; and such an allegation need not be proved, though it be made on the record (*q*); but the illegality of the publication must be averred by means of the word "maliciously," or by some equivalent term (*r*).

The averment of extrinsic facts is unnecessary where the criminal quality of the publication may be collected from its contents; as in a case where the crime of murder was imputed to the complainant; it was held to be unnecessary to state the fact of a murder having been committed, if the libel asserted the fact, and imputed it to the complainant (*s*).

Averment of
Extrinsic
Facts.

Where an information alleged that a libel was published of and concerning the government; and the libel was written in such terms that an ordinary person, on reading it, would understand that it was written of the government of the country; it was held, that any extrinsic allegation for the purpose of explaining the meaning was unnecessary (*t*). But where an

Innuendoes,
when neces-
sary.

(*m*) See as to the mode of describing a libellous caricature, *Carr v. Hood*, 1 Camp. N. P. 354.

(*n*) *Bradlaugh and another v. The Queen*, 3 Q. B. D. 607; 48 L. J. M. C. 5.

(*o*) 51 & 52 Vict. c. 64, s. 7.

(*p*) See *The King v. Barraclough*, 1 K. B. (1906) C. C. R. 201.

(*q*) *R. v. Burks*, 7 T. R. 4.

(*r*) Sty. 392; per Roll, C.J., 1 Vin. Abr. 533; but see *The Queen v. Munslow* [1895], 1 Q. B. 759; 64 L. J. M. C. 138, and *supra*.

(*s*) *R. v. Gregory*, 8 Q. B. 512; 15 L. J. M. C. 38.

(*t*) *R. v. Burdett*, 4 B. & A. 314; and see *R. v. Horne*, Cowp. 682.

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indictment charged that the defendant published, of and concerning the Duke of Brunswick, the following libel—"The evidence to facts in relation to the particular subject alluded to is procuring; and we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party (meaning the said Duke) that his presence here can be dispensed with, as it may be attended with danger to himself (thereby meaning, and intending to have it believed, that the said Duke was suspected of having committed, and had committed, some crime which would bring his life into danger from the laws of England),"—it was held, by a Court of Error, that the count was bad, inasmuch as it did not show in what manner the life of the Duke would be endangered (*u*). And where on the trial of an indictment for libel, the matter charged did not, in the absence of an averment or innuendo, appear to be *primâ facie* libellous, it was ruled that the indictment was bad (*x*).

Unless a libellous meaning be either apparent on the face of the alleged libel, or can be collected from the terms of it, as connected with extrinsic circumstances, no innuendo will either make the publication criminal, or subject the publisher to a civil action (*y*).

When the
Intention of
the Publication
should be
alleged in the
Indictment.

When some special intention is essential to the offence, such intention must be described according to the truth, and the nature of the offence. So where the indictment is founded on a libel written to degrade the memory of one deceased, it should be alleged to have been published with the intent to bring contempt on the family of the deceased, and to excite his relations to a breach of the peace (*z*). And so also in some other cases it may be necessary to allege a particular intent, as an intent to defame a particular class of persons; or to bring the administration of justice into contempt.

Indictment for
a seditious
conspiracy;
objections to.

A count charging several defendants with conspiring to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the *intimidation* to be thereby caused, and by

(*u*) *Gregory v. The Queen*, 15 Q. B. 975, note (*a*).

(*x*) *Reg. v. Yates*, 12 Cox, C. C. 233, per Quain, J.

(*y*) See *R. v. Alderton*, Sayer, 280; *R. v. Burdett*, 4 B. & A. 314; *R. v. Horne*, Cowp. 682; *Stockley v. Cle-*

ment, 4 Bing. 162; *Goldstein v. Foss*, 6 B. & C. 154; 1 Mo. & P. 402; 2 Y. & J. 146; *Capital & Counties Bank v. Henty*, *supra*, p. 242.

(*z*) *R. v. Topham*, 4 T. R. 126; and *supra*, p. 436.

means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm, was held bad: first, because "intimidation" is not a technical word necessarily having a meaning in a bad sense; and secondly, because it was not distinctly shown what species of intimidation was intended to be produced, or on whom it was intended to operate (a).

If the libel charged be in a foreign language, it should be set out in the indictment in that language, together with a translation in English: and such translation must be proved, on the trial, to be correct (b).

As to the pleas to an indictment or information for a libel.

By the Crown Office Rules (1906), every pleading other than a plea of guilty, or not guilty, to an indictment, information, or inquisition, must be intituled "In the High Court of Justice, King's Bench Division," and must be dated of the day of the month and year when the same was pleaded, and must bear no other time or date. It must be written or printed on paper, and a copy must be delivered to the opposite party and be filed at the Crown office. If settled by counsel it must be signed by him, and if not so settled must be signed by the solicitor, or the party if he defends in person (c).

The most usual plea to an indictment or information for libel, is the general one of "Not Guilty"; by which the defendant puts himself upon the country for his deliverance, and is entitled to take advantage of every defect in the evidence for the prosecution; or to rebut that evidence by counter proof, tending to convince the jury, either that the act imputed was not committed, or, admitting the publication, to show from the context (d) or other circumstances, either that the matter published was not criminal in its nature; or, if criminal, that it was published inadvertently (e), and without any guilty knowledge or intention (f), or that it was published on an occasion which the law recognizes as constituting either an absolute privilege, independently of the question of intention; or a conditional privilege dependent on the actual intention and motive of the defendant (g).

(a) *O'Connell and others v. The Queen*, 11 Cl. & Fin. 155.

(b) *R. v. Peltier*, 2 Sel. N. P. 1048; *Zenobio v. Aztell*, 6 T. R. 162; *R. v. Goldstein*, 3 Brod. & Bing. 201; and *vide supra*, p. 235.

(c) C. O. R. 1906, rr. 117-122.

(d) *R. v. Lambert and Perry*, 2 Camp. C. 398.

(e) *R. v. Abingdon*, 1 Esp. 226.

(f) *R. v. Holt*, 5 T. R. 444; *The Queen v. Holbrook and others*, *infra*.

(g) *Infra*, p. 509, *et seq.*

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Statutory plea
of truth, when
available as a
justification to
Indictment
for libel.

As to pleading a Special plea, alleging the *truth* of the libel, by way of justification to an indictment or information. Although the truth of the defamatory matter is a ground of justification in a civil action, it is not so in criminal proceedings for libel, except under the circumstances hereinafter stated. The truth of the libel is a justification in a civil action, not solely on grounds of extrinsic and collateral policy, but also because the very foundation fails, on which the claim to damages might otherwise be erected; that foundation being the falsity of the defamatory charge. On the other hand, the *tendency* of the defamation to produce a breach of the peace, is of the essence of the offence as far as the public are concerned; and therefore the truth or falsity of the publication is collateral to the offence; and it is obvious that the imputation may be not the less malicious or provoking because it is true: but until the Libel Act, 1843 (*h*), the truth of the matter charged was no answer to an indictment or information for libel; and could not be inquired into at the trial. An important alteration was, however, made in the law in that respect by the 6th section of that statute; whereby, on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as therein mentioned, the truth of the matter charged may be inquired into; but will not amount to a defence, unless it was for the public benefit that such matters should be published; but further, to entitle the defendant to give evidence of the truth of such matters, as a defence to the indictment or information, the defendant in pleading to the same is required to allege the truth of the matters charged, in the manner required in pleading a justification to an action for defamation; and, further, to allege that it was for the public benefit that those matters should be published; and the particular fact or facts by reason whereof it was for such public benefit; to which plea the prosecutor is at liberty to reply generally, denying the whole thereof: and if, after such plea, the defendant is convicted, it is competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or disprove the same: but it is expressly provided that the truth of the matters charged in the alleged libel will in no case be allowed to be inquired into without such plea of justification: and the

(*h*) 6 & 7 Vict. c. 96.

defendant in addition to such plea may plead a plea of "Not Guilty" (i).

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The plea under this section must be "in the manner now required (k) in pleading a justification to an action for defamation." It must, therefore, be a special plea, setting out the truth of the matters charged and relied on in justification (l).

Previous to that statute the truth of the charges contained in a libel was no defence to an indictment or criminal information for publishing it (m). Moreover, the truth of the matters charged as libellous could not be given in evidence under a plea of "Not Guilty"; and no special justification on the ground of such truth could be pleaded. And therefore, when the prosecutor has replied to such plea,—that the defendant wrongfully published the libel without the cause alleged; and issue has been joined upon that replication, the prosecutor is entitled to a verdict, unless the defendant proves to the satisfaction of the jury, the truth of all the material allegations in the plea (n).

It will be observed, that the plea of the truth of the matters charged will be no defence unless the publication was for the public benefit. There are indeed cases in which such a plea would be an aggravation of the libel; as, for instance, where it consists in the holding up of an individual to ridicule, by exposing some personal deformity, in a lampoon or print, the truth of the representation would certainly aggravate the ridicule, and by no means lessen the malice of the author (o). And with respect to libels against religion or morality, the permitting such a defence would be attended with consequences almost too absurd to mention. Suppose a person were to publish, that no overruling Providence exists; or that, to break a promise or an oath is a virtuous act; could the discussion of such questions be tolerated in a court, or brought to issue before a jury? or would proof that indecent transactions have actually occurred supply any excuse for the public exhibition of them in a print or a pamphlet? And the same

Manner of
pleading the
statutory plea.

Indispensable
allegations.

Plea of Truth,
&c., no Justification in
some cases:

Such as Libels
against Religion or
Morality.

(i) 6 & 7 Vict. c. 96, s. 6.

(k) *I.e.*, at the time of passing the Act (24th Aug. 1843).

(l) See form of Plea, *infra*, "Precedents of Pleas."

(m) 5 Co. 125, *De Libellis Famosis*; *Lake v. Hatton*, Hobart, 252; 11 Mod. 99; *R. v. Burdett*, 4 B. & Ald. 95.

(n) *Reg. v. Newman*, 1 E. & B. 558.

(o) Digest Law Lib. 16; 3 Bac. Ab.

495; 4 Bac. Ab. 516; *The King v. Roberts*, cor. Ld. Hardwicke. *Put a si alter poenam delicti sui sustinuerit, aut in vitium naturale obijciatur, claudus aliquis, luscus, aut gibbosus vocetur veritatem convicii non excusare quo minus animo injuriandi, id factum presumatur, contrarii tamen probationem hic admittendam. Vinn. in In. Just. lib. 4.*

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Nor in case of
Seditious
Libels.

principles apply to the publication of seditious libels ; and so also to blasphemous libels. And where a plea of justification under the above section was pleaded to an indictment for publishing a *seditious* libel, the plea was held bad, on demurrer, by the Court of Queen's Bench in Ireland (*p*), as inapplicable to such an indictment, and not contemplated by the statute.

CHAPTER XXXIV.

OF THE EVIDENCE IN SUPPORT OF AN INDICTMENT,
OR A CRIMINAL INFORMATION.

Publication, what is.

Publication in a particular County.

Composing or making a libel.

Publication by dictating the contents.

Evidence that the matter charged is a libel.

Secondary evidence as to authorship.

Proof of introductory averments and innuendoes.

The application of the libel to the Prosecutor.

Where the libel applies to one of several.

Motive and intention of the Defendant.

Presumption of law as to.

Where a specific intention is alleged.

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Evidence in
support of
Indictment
or Criminal
Information
for Libel.

WITH respect to the evidence to be adduced in support of a criminal charge, little need be added to the analogous proofs already stated as applicable to civil proceedings ; the materials of evidence, and the rules which govern their application, are for the most part common to both.

Upon the trial of an indictment or criminal information for publishing a libel, the prosecutor must prove :—

1. The fact of publication by the defendant.
2. That the matter charged is a libel.
3. The introductory averments and the innuendoes.
4. The application of the libel to the prosecutor.
5. The malice of the defendant.

1st. *As to the fact of publication by the defendant.*—Before the libel can be read against the defendant, *primâ facie* evidence of publication by him or by his request or authority must be given (*a*).

(*p*) *The Queen v. Duffy*, 9 Ir. L. R. 329 ; 2 Cox, C. C. 45 ; 6 St. Tr. (N.S.) 303 ; and see *Ex parte O'Brien*, L. R.

(Ir.) 12 Q. B. 32.

(*a*) *Rex v. Almon*, 5 Burr. 2689.

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XXXIV.Publication,
what is it?

The *evidence of publication* has already been adverted to in detail (b). Whatever is a publication sufficient to entitle a plaintiff in a civil action to a verdict, is equally so in a criminal proceeding; with this addition, that the sending of a libel to the individual reflected on, without exposing the contents to a third person, is a sufficient publication to support an indictment; on account of its tendency to provoke that individual to commit a breach of the peace (c). And the defendant may be found guilty of the publishing, and acquitted of the composing, writing or printing of a libel, where they are conjointly alleged (d). As where the record varies from the printed libel, but agrees with the manuscript delivered by the defendant to the printer (e).

In the case of libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone, he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ*; his offence is complete; all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act (f). And so also if he expose the libel to any person to read, without parting with the possession of it; or if he read it to another, or otherwise in any manner make known its contents, such is, in law, a publication.

The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as fact; and it is a question for the court, in doubtful cases, whether the facts, when proved, would constitute a publication in point of law.

Proof of the publication of a libel may be established by evidence of sending it to the wife of the person libelled; as in a case where the defendant was indicted for sending to Lady Caroline Fox a scandalous libel on her husband, a privy councillor (g).

In criminal cases it is necessary to prove a publication

(b) *Supra*, Chap. XVI., p. 261.

(c) 2 Esp. 226; 5 Mod. 163; 12 Co. 35; 1 Hob. 62, 215.

(d) *R. v. Hunt and another*, 2 Camp. 583; *R. v. Hart and another*, 10 East, 94.(e) *R. v. Williams*, 2 Camp. 646,

cor. Lawrence, J.

(f) *Vide per Best, J., The King v. Burdett*, 4 B. & Ald. 126.(g) Hil. Term, 1 Geo. III. (1761), K. B. MSS. *The King v. Bonell*, Digest Law of Libels, 82, and 127; and *vide supra*, p. 269.Publication to
wife, of Libel
on husband.Publication in
a particular
county.

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within the particular county. Whenever the publication of a libel has once been authorised by the defendant, he is guilty of a publication in whatever county the libel is afterwards published (*h*). And if a letter be sent by the post, it is a publication by the defendant in any county to which the letter is, in consequence, sent (*i*). Where the writer of a libel sent it by the post, directed to A. B. in the county B., and it was in consequence sent into the county B., and from thence sent by the post, directed to A. B., in the county M., where A. B. received it, and read it; this was held, to be a publication in the county M. (*k*).

Post-mark.

If the libel be dated of a particular place, the date is evidence that it was written there (*l*). It has been said that the post-mark upon a letter is not *primâ facie* evidence to prove that a letter has been put into the post-office at the place denoted by the post-mark (*m*); it seems, however, from a later authority, that the post-mark is a fact admissible in evidence when corroborated by other circumstances (*n*). Upon principle, there seems to be little doubt that a post-mark upon a letter in the handwriting of a defendant, and received through the medium of the post, is evidence as a circumstance arising in the usual course and routine of business (*o*). And where a letter containing a libel was proved to be in the handwriting of the defendant, and addressed to a person in Scotland; that it was received from the C. post-office at H. in Essex, and forwarded to London to be forwarded to Scotland: at the trial the letter was produced bearing the proper post-marks, and with the seal broken: and this was held sufficient *primâ facie* evidence that it was received in due course by the person to whom it was addressed; and of a publication to him (*p*). The post-mark is evidence to show that the letter was in the office whose mark it bears, at the date of the mark (*q*). It would appear, however, that a post-mark is not to be taken as genuine without regular proof; and if there be any doubt as to the genuineness of the mark, the person who made it is the best witness to call (*r*).

(*h*) B. N. P. 6, *Rex v. Middleton*; *R. v. Johnson*, 7 East, 65.

(*i*) *R. v. Watson*, 1 Camp. 215.

(*k*) *Ibid.*; and see *R. v. Girdwood*, East's P. C. 1116, 1120.

(*l*) *R. v. Burdett*, 4 B. & Ald. 95.

(*m*) *R. v. Watson*, 1 Camp. 215.

(*n*) *R. v. Johnson*, 7 East, 65.

(*o*) See *Fletcher v. Braddyll*, 3 Starkie's C. 64.

(*p*) *Warren v. Warren*, 1 C. M. & R. 250.

(*q*) *R. v. Plumer*, Russ. & Ry. 264.

(*r*) *Abbey v. Lill*, 5 Bing. 299; *Woodcock v. Houldsworth*, 16 M. & W. 124.

A general confession by the defendant that he was the *writer* of a libel does not amount to an admission that he *published* it, still less is it a confession that he published it in any particular county (*s*). In a subsequent case upon this subject, which at the time excited much interest, and occasioned much legal investigation and discussion, the points were shortly as follow:—The information charged the defendant with composing, writing, and publishing a libel in Leicestershire; A. stated that he received the libel, which was in the handwriting of the defendant, from B., on the 24th of August (*t*); it was contained in an envelope, which had been destroyed, but which, to the best of the witness's recollection, was addressed to B., who was the professional friend of the defendant; there was no trace of any seal either on the envelope or the paper. The paper was dated Kirby Park, August the 22nd,—Kirby Park (the defendant's seat) being situate in Leicestershire, a hundred miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leicester, near Kirby Park, on the 22nd and on the 23rd of August; and there was no evidence of his having left the county of Leicester till after the publication (*u*) of the paper, which took place on the 25th; the only words, either on the paper or envelope, besides the libel, were "Forward this to A." (the witness). The paper was addressed to the electors of Westminster; and A. had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. A. having been required to give up the author, the defendant wrote a letter admitting that he was the author. No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the Court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a *publication* in *Leicestershire*. After elaborate argument, it was held, by the majority of the court, that the evidence was sufficient to warrant the conviction; and that if a libel be written

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What is
evidence of
Publication in
a particular
county.

(*s*) The *Seren Bishops' case*, 4 St. Tr. 304, 4 Jac. II., where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held, that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And

see the observations upon this case by Lord Ellenborough, C.J., in *R. v. Johnson*, 7 East, 68.

(*t*) A. did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

(*u*) *I.e.*, in the public newspapers.

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in one county and published in another, the libeller may be prosecuted in either (x).

And if a person in Ireland procure another to publish a libel in Middlesex, he may be indicted in Middlesex (y).

Primâ facie
proof of
publication.

Where proof has been given of the purchase at the defendant's shop, of a paper containing the libel; such is sufficient *primâ facie* evidence to entitle the prosecutor to have it read (z). And proof that the defendant procured a number of placards to be printed from a manuscript, part of which when printed he took away, is sufficient to warrant the reading in evidence of one of those copies left with the printer (a).

Proof of
Publication by
Acknowledg-
ment :

Where the defendant had acknowledged himself to be the author of the libel produced in evidence, errors of the press and some small variations excepted, his counsel objected that the confession was not absolute, and that therefore the libel could not be read; but Pratt, C.J., allowed it to be read; saying, that he would put it on the defendant to prove material variances (b). On the trial of an information for libel, setting forth that the defendant "caused to be printed and published a scandalous libel called 'The Post-boy of — to —,' in which was contained the following scandalous passage" [setting forth the paragraph]. Upon the trial it appeared that the defendant brought the paragraph to the printer, and desired him to publish it in "The Post-boy." Raymond, C.J., ruled that this evidence did not support the information, which charged the defendant with the publication of the whole paper; whereas he was only concerned in part of it; and so the defendant was acquitted (c).

as to part only.

Accessories to
the Publica-
tion.

According to the general rule of law that in misdemeanours all are principals, and there are no accessories (d), it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are considered as principals in the act of publication; thus if one suggest defamatory matter, in order that another may write or print it and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.

(x) *R. v. Burdett*, Bart., 3 B. & Ald. 717; 4 B. & Ald. 95.

(y) 7 East, 68.

(z) *Rex v. Almon*, 5 Burr. 2689.

(a) *R. v. Watson*, 2 Starkie's C. 129; 12 Vin. Abr. 229.

(b) *R. v. Hall*, Str. 416.

(c) *R. v. Newport*, 2 Sess. Cas. 32, pl. 36; Digest Law of Libels, 97.

(d) See *Reg. v. Greenwood*, 2 Den.

C. C. 453.

The mere composing and writing a libel, without publication (e), is not in itself actionable: but whether the writing and composing a libel *with intent to publish it*, though not followed by actual publication, be an indictable offence, seems doubtful: the point was discussed, but not decided, in the case of *The King v. Sir Francis Burdett* (f).

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Writing and
composing a
libel with
intent to
publish.

There can be no doubt, however, that if a person write a libel of another, or keep such in his possession, though he have no intention of publishing it, yet if through his negligence or inadvertence it falls into other hands, he is liable civilly, though probably not criminally, the *mens rea* being absent.

And it has been held, that to copy a libel, knowing it to be a libel, for the purpose of publication, is indictable; and so also to copy the copy of a libel for the same purpose (g).

Copying Libels.

Where the defendant was tried upon an information, setting forth that he was the composer, author, and publisher of a malicious libel against the late Queen Mary, styled "Her Epitaph," the jury found, by way of special verdict, that a certain person to them unknown did pronounce, dictate, and repeat the words contained in the libel which the defendant did write; and if that will make him guilty of the composing and making of the libel, then they find him guilty; and as to the publication they find him "*Not Guilty*." After argument, the court observed, "The making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it: to what purpose should any one *write* or *copy* after another but to show his approbation of the contents of a libel, and the better to enable him to keep it in his memory and repeat the contents of it to others." The matter was however adjourned and it does not appear that any judgment was given (h).

Writing a
Libel from
dictation.

A person may be indicted as a principal for a libel which he dictated to another; as where a defendant communicated a story to the editor of a newspaper, and asked the editor to "show up" the plaintiff; and the editor afterwards told the story to the reporter, who wrote and published it; the story being substantially the same as that communicated by the defendant, but with comments, giving it a ridiculous character; it was held, that the defendant was properly convicted of

Liability of
person dic-
tating a libel
to another.

(e) See *Lamb's case*, 9 Co. Rep. 59.

(g) *R. v. Beere*, 12 Mod. 220.

(f) 4 B. & Ald. 95; see per Abbott, L.C.J., *Ibid.*, 138; and per Holroyd, J., *Ibid.*, 135.

(h) *Paine's case*, 5 Mod. 163; 1 Salk. 281; Comb. 358; Carth. 405; 1 Lord Ray. 729; Holt, 294.

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publishing, and causing and procuring the libel to be published (i).

Upon the whole, whatever doubt may exist as to the criminal nature of the act, where it is confined to the mere writing, printing, or preserving of a libel; it seems to be perfectly clear, that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents; is indictable as a principal for the whole mischief produced. And according to the doctrine laid down in *Lamb's case* (k), where a libel has been published, proof that the defendant committed it to writing; or, by parity of reasoning, did any other act contributing to its existence, as for instance, that he dictated it (l), is great evidence that he published it, unless he can satisfactorily explain the motive of his act.

Who is a
Publisher.

And not only the party who originally prints, but every person who utters, sells, gives, or lends a copy of an offensive publication to any other person, is liable to be prosecuted as a publisher (m).

Evidence to
rebut *prima*
facie case of
publication by
an agent.

The sale, therefore, by an agent in a shop, in the usual course of business, is *prima facie* evidence of a publication with the knowledge and privity of the owner; and although it be not conclusive evidence, yet it throws upon him the necessity of rebutting the presumption by evidence to the contrary (n), even if the principal lives at a distance from his shop (o); for the law presumes that the master is acquainted with what his servant does in the course of his business (p). But the defendant may rebut the presumption, by evidence that the libel was sold contrary to his orders, or clandestinely; that by reason of sickness he was ignorant of the fact; that some deceit or surprise was practised on him (q); or that he was absent under circumstances which entirely negative any presumption of privity or connivance (r); as when a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity (s).

(i) *Reg. v. Cooper*, 8 Q. B. 533; 15 L. J. Q. B. (N. S.) 206; and see *Parke v. Prescott and another*, *supra*, p. 272.

(k) 9 Co. 59.

(l) *Reg. v. Cooper*, *supra*.

(m) *The King v. Mary Carlile*, 3 B. & Ald. 169.

(n) *R. v. Almon*, 5 Burr. 2689; Wood's Ins. 443; 12 Vin. Ab. 229; *Plunkett v. Cobbett*, 5 Esp. C. 136.

(o) *R. v. Dodd*, 2 Sess. C. 33; Digest Law of Libels, 27.

(p) *R. v. Nutt*, 1 Barnardiston, K. B. 306; Fitzg. 47; Digest Law Lib. 27.

(q) See the observations of Aston, J., in *R. v. Almon*, 5 Burr. 2686.

(r) *Vide The Libel Act, 1843* (6 & 7 Vict. c. 96, s. 7).

(s) *R. v. Woodfall*, 5 Burr. 2661; 2 Str. 1131; Leach's ed. of Haw. b. 1,

2ndly. *That the matter charged is a libel.* It must be proved to the satisfaction of the jury, under the direction of the judge (and to the satisfaction of the court on motion in arrest of judgment), that the matter charged in the indictment as having been published by the defendant is, in law and in fact, a libel (*t*). The cases and authorities on the subject, as to what in law amounts to a libel, have already been cited (*u*): and as to the direction to be given to the jury upon that question, the matter is discussed in a subsequent chapter (*x*).

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Evidence that the matter charged is a Libel.

Upon the trial of an indictment or information for publishing a libel, the libel complained of should be produced on the part of the prosecution; and after proof of publication by the defendant, may be read to the jury. If the libel has merely been exhibited by the defendant, and notice has been given him to produce it on the trial, and he refuse to do so, parol evidence may be given of its contents (*y*). And secondary evidence may sometimes be given as to the authorship of an anonymous libel. So, on the trial of an information for libel, containing an averment that the prosecutor had received certain anonymous letters, and that the defendant published a placard of and concerning those letters, which placard contained the question, "Were you not warned that your character was at stake?" and the prosecutor declared that he should not have understood the meaning of the placard if he had not also seen the anonymous letters, and that he understood the passage in the placard to allude to those letters; it was ruled, that the anonymous letters were then admissible on the part of the prosecution, without proving who wrote or sent them; as the placard referred to them, and was made intelligible by reference to them; and that a person who refers to other papers in his publication, must submit to have them read, as explanatory of such publication (*z*).

The Libel itself must be produced at the Trial.

Secondary evidence as to Authorship of Anonymous Letters.

3rdly. *As to proof of the introductory averments and innuendoes in an indictment or criminal information for libel.* When these are necessary for the purpose of explaining the libel, the intention of the libeller, or the application of the libellous matter to the prosecutor, they must be proved as laid (*a*).

Proof of Introductory Averments and Innuendoes.

c. 73, s. 10, note (3); but see *The Queen v. Holbrook and others*, *infra*, p. 504; also "Evidence for the Defence," *infra*, p. 498.

(*t*) Libel Act, 32 Geo. III. cap. 60.

(*u*) *Supra*, Chap. VI.

(*x*) *Infra*, Chap. XXXVI., pp. 514,

516 *et seq.*

(*y*) *It. v. Watson and others*, 2 T. R. 201, per Buller, J.; and *vide supra*, pp. 274–5.

(*z*) *R. v. Slaney*, 5 C. & P. 213, *cor.* Lord Tenterden, C.J.

(*a*) *Vide supra*, p. 240, "Innuendoes."

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A gazette is evidence to prove an averment that certain addresses have been presented to the king (*b*). So the king's proclamation for the discovery of certain offenders, reciting that outrages have been committed in certain districts, is evidence to satisfy an introductory averment in an information for a libel, that such outrages had been committed (*c*). An allegation that the defendant was duly elected treasurer of a particular parish, is proved by an entry in the vestry-book, stating, that he was elected to that office at a vestry held after notice (*d*). Where the indictment alleges that the prosecutor, at the time of the libel, filled a particular situation, it is sufficient to prove a previous appointment without showing its continuance ; for the commencement being shown, the continuance will be presumed ; as in the case of an indictment for a libel on Lord St. Vincent, in his character of First Lord of the Admiralty ; the prosecutor produced his patent, and the proof was deemed sufficient (*e*). But unless strict proof of appointment be rendered necessary by the particular mode of averment, proof that a party acted in a public office is sufficient *prima facie* evidence that he really held it.

In an information for a libel imputing improper conduct to the town-clerk of H., it was alleged that he was town-clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town-clerk : it was ruled that this satisfied the allegation that he issued his precept, and that the fact that he was an alderman of the borough at the time when he was elected town-clerk made no difference (*f*).

In criminal, as in civil proceedings, for libel, it is unnecessary to give further proof of facts which the alleged libel assumes to be true (*g*). Where, in a criminal information for libel, introductory averments are made as to certain transactions having taken place, and that the libel was published of and concerning them ; and the libel is then set out as referring to them ; and the prosecutor at the trial gives general proof of such transactions to support the introductory part of his pleading ; the defendant is not thereby authorised to give evidence of the particular history of those transactions, so as to bring

(*b*) *R. v. Holt*, 5 T. R. 436.

(*c*) *R. v. Sutton*, 4 M. & S. 546.

(*d*) *R. v. Martin*, 2 Camp. 100, *cor.* Macdonald, C.B.

(*e*) *R. v. Budd*, 5 Esp. 230.

(*f*) *Rex v. Hatfield*, 4 C. & P. 244.

cor. Vaughan, B.

(*g*) See *R. v. Sutton*, 4 M. & S. 548 ; *Berryman v. Wise*, 4 T. R. 366.

into issue the truth or falsehood of the libel. But if such evidence be adduced *bonâ fide*, with a view to inform the jury of the nature of the transactions, from which they might judge whether the libel related to them or not, and the judge is informed that the evidence is offered for that purpose, it is admissible (*h*).

4thly. *The application of the libel to the prosecutor.* It must be proved that the prosecutor is the person libelled; for unless the libel is shown to apply to the person charging the defendant with the publication of it, as a libel upon him, the indictment cannot be sustained (*i*). That the libel applies to the prosecutor.

Where the prosecutor is actually named in the publication itself, no further evidence will usually be necessary as to its application to him. But where the libel is covertly expressed as to the name of the person or the application of the defamatory matter, evidence must be given to show that the prosecutor is the person to whom it applies, or was meant to apply. But whatever the intention, if the jury find by their verdict, that any person to whom it was published would understand it to apply to the prosecutor, such finding will be sufficient to sustain the verdict (*k*).

Where the intention to apply defamatory remarks to the prosecutor is rendered doubtful and ambiguous, by the defendant having left blanks for names, or from his having given merely the initials, or introduced fictitious names, it is always a question for the opinion and judgment of the jury, whether the prosecutor was the party really aimed at. For this purpose the opinions of witnesses, who, from their knowledge of the parties and the circumstances, are able to form a conclusion as to the defendant's intention and application of the libel, are evidence for the information of the jury. Identification of Prosecutor as the person calumniated.

So the declarations of spectators, whilst looking at a libellous picture, publicly exhibited in an exhibition room, have been received in evidence to show that the figures portrayed were meant to represent the parties alleged to have been libelled (*l*).

A defamatory writing expressing only one or two letters of a name, but in such a manner that, from what precedes and Where initials only are given.

(*h*) *Reg. v. Grant and others*, 5 B. & Adol. 1081; 3 Nev. & Man. 106. (*k*) *Vide Le Fanu v. Malcomson*, 1 H. L. Cas. 637, 661.

(*i*) *R. v. Butcheler*, Fitzg. 57, pl. 7; Digest Law of Libels (1765), p. 97; and *vide supra*, Chap. XVI., p. 276. (*l*) *Du Bost v. Beresford*, 2 Camp. 512, per Lord Ellenborough, C.J.

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follows, it must needs be understood to signify that it refers to the prosecutor, in the plain, obvious, and natural construction of the whole, is as much a libel as if the name had been published at large; and the court and jury will so understand it, and will not suffer justice to be defeated by such attempted evasions (*m*).

It will, therefore, be seen that the consequences of the publication of defamatory matter cannot be evaded under any disguise of style; for the law is not to be defrauded, and the punishment of the libeller eluded on account of the mystery of his satire; but always proportioned to the mischief done, and the poison intended to be conveyed by it (*n*).

Where blank
left as to name.

Where the name of the party calumniated is left in blank, general evidence by those who know him, is sufficient for the purpose of proving that he was the person meant; but such evidence is insufficient if it turn out upon inquiry, that the witness derives his conclusion merely from the terms of another libel, with the publication of which the defendant had no concern (*o*).

Where the libel
applies to one
of several
persons, but
without
naming any one
in particular.

An indictment was preferred against the defendant, a book-seller, for a libel on the Aides-de-camp of the Governor and Commander-in-Chief of the Leeward Islands, contained in a book purporting to be "The Tenth Report of the Directors of the African Institution." The libel imputed that a gentleman who held the situation of aide-de-camp to the governor, had severely whipped a negro woman of his own, who was pregnant; that on her making complaint to the governor, the gentleman gave the woman an additional number of lashes, and dispatched an insolent note to the governor, who in consequence ordered his dismissal from the service. It appeared that at the time of the publication, there were *eight* several gentlemen who were aides-de-camp to the Governor-General: and the indictment charged it, in the first count, as a libel of and concerning the eight. The indictment also charged it as a libel, in eight separate counts, on eight separate individuals named in those counts. But it appeared, on the evidence, to be impossible to apply it to any one of those eight, because the libel did not designate any one of them further than by his situation of aide-de-camp; and impossible also because it was

(*m*) *The Queen v. Hurt*, T. T. 12 Ann. (1711); Digest Law of Libels, 7; and *vide Roach v. Read*, 2 Atk. 469.

"Gentleman of the Inner Temple," p. 13.

(*n*) Digest Law of Libels, by a

(*o*) *Bourke v. Warren*, 2 C. & P. 307, *cor.* Abbott, C.J.

proved that the facts stated in the libel were wholly false and groundless. And the publication did not contain any matter by which any person acquainted with all of them might apply it to one in preference to the others. It was argued by the Attorney-General on behalf of the defendant, that it was a mere *descriptio personæ*, and that the libel did not charge the act as done in his character of aide-de-camp, and that it was not a libel on the body at large. But per Abbott, J. (*p*), "I have not the slightest particle of doubt that a count might be so framed as to make this a libel against the eight; for if it were otherwise, a person might publish a libel of one of eight persons, and the facts being so false, no human being could apply it to any one of them, he must go unpunished, though he may have brought eight persons into slander and reproach." And the learned judge said, he would take the opinion of the jury whether the publication had the effect of bringing the several persons who filled the situation of aides-de-camp into suspicion and disgrace; and if they thought it did, they would find the defendant guilty on the first count, and in that event counsel for the defendant should be at liberty to apply to the court to correct that verdict, if the evidence did not support it. And accordingly the jury were directed to say, by their verdict, whether they were of opinion that the publication in question,—ambiguous as it was, and utterly false as it had been proved to be, and for those two reasons incapable of application to any one of them, but manifestly reflecting upon some of them,—was a libel calculated to bring all of them into public suspicion and disgrace: that if they were of opinion it had that effect, they would say that the defendant was guilty on the first count. The jury having found the defendant *Guilty* on the first count; on his coming up for judgment, Serjeant Best moved for judgment, and Scarlett and other learned counsel addressed the court in mitigation of punishment, but no exception was taken to the ruling and direction of the learned judge (*q*).

Though a defamatory publication may, *prima facie*, apply to individuals merely as a class, yet if it contain statements or descriptions which can be shown by *innuendo* (without extending the sense of the words) to be directly applicable to any person in particular of the class alluded to, an action or

Where the Libel applies to a Class or body of persons.

(*p*) Afterwards Abbott, C.J., and subsequently Lord Tenterden, L.C.J. jury. [From a printed report of the trial, taken in shorthand, by Mr.

(*q*) *The King v. Hatchard*, Feb. 20th, 1817, *cor.* Abbott, J., and a special Gurney.]

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Or on parties
without speci-
fically naming
them.

The Jury to
determine
whether libel
applies to
Prosecutor.

Libel on a
person by
covert descrip-
tion.

indictment may be sustained by such person in respect of the publication. So in the case of an action, where the declaration stated that the plaintiff was the owner of a factory in Ireland, and then charged that the defendant published of him, and of the said factory, a libel, imputing that "in some of the Irish factories (*innuendo*, meaning thereby the plaintiff's factories) cruelties were practised"; though there was no allegation otherwise connecting the libel with the plaintiff: the declaration was, after verdict, held good (r). And Lord Cottenham, C., observed, in the course of his judgment:—"If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here; and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation if parties suffering all the inconveniences of being libelled were not permitted to have that protection which the law affords. If they are so described, that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels" (s). And the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint; and such is clearly a reasonable principle, because, whether a man is called by one name or another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted as if his name and Christian name were ten times repeated (t).

The court granted a rule *nisi* for a criminal information against the publisher of a newspaper, for a libel containing very gross imputations upon a person not named in the libel, but described as "a member of the aristocracy, of refined taste and studious habits, and an artist of more than ordinary

(r) *Le Fanu and another v. Malcomson and others*, 1 H. L. Cases, 637.

(s) *Ibid.*, p. 664.

(t) Per Lord Cottenham in the same, p. 668.

ability"; upon affidavits by the applicant and three other persons, that from the description and other statements contained in the libel, they understood and believed it to refer to the relator. But on showing cause against the rule, affidavits were read, one by the publisher of the paper, stating that he had made inquiry of the writer of the article (whom he named), and had ascertained from him that the applicant was not the person referred to, or intended to be described or referred to. There was also an affidavit by the writer of the article himself, emphatically and distinctly denying that the applicant was the person referred to: but without saying to whom he did refer; the court deemed this sufficient. And per Cockburn, L.C.J., the writer could not be required to answer as to that: it is sufficient that he swears he did not refer to the applicant. And as counsel on his behalf expressed himself satisfied with the public disclaimer, the court permitted the rule to be discharged (*u*).

5thly. *As to the malice of the Defendant.* The rule of law on this subject, in criminal, is analogous to that in civil proceedings (*x*). As malice is necessary in order to constitute civil responsibility, *a fortiori*, it is essential to make a party criminally amenable. As to the malice of the Defendant.

The defendant's malice consists in his intention to effect the particular mischief; and, as in all other cases, what he intends must be inferred from what he does. If nothing appears from which the intention is to be collected, except the publication of the libel itself, unexplained by any context of circumstances; if the very terms of the document itself tend to scandalize, degrade and injure the individual, or to excite to acts of outrage and sedition, the *intention* on the part of the defendant to effect those objects must necessarily be inferred without the aid of any extrinsic proof (*y*). If, on the other hand, there be facts and circumstances which supply a justification or excuse, provided the defendant acted honestly, with a view to the occasion, and was not actuated by express collateral malice; then it lies on the prosecutor to prove such express malice, or malice in fact (*z*). Intention, when to be inferred.

Where there is no evidence of such facts and circumstances

(*u*) *In re Lord Ronald Gower, and "The Man of the World."* *Sittings in Banco*, January 12th, 1879; MS.

(*x*) *Supra*, Chap. XIII., p. 204.

(*y*) *Vide supra*, pp. 205 and 375.

(*z*) As to what is evidence of malice see *ante*, Chap. XIII., p. 206.

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as would, if found by the jury, raise either an *absolute* justification, independently of the question of intention, or a conditional justification or excuse, dependent on actual intention : then, if the question of malice is to be regarded as a question of fact for the jury, it is undoubtedly one which they ought, in that predicament, to draw from the commission of a noxious act. It is a plain and obvious principle, in morals as well as law, that every one must be taken to contemplate and intend the natural and immediate consequences of the act which he does, and the means which he uses.

Motive and
Intention of
the Defendant.

Where a party is instrumental to a publication of that which is noxious and illegal, without any moral blame imputable to himself, he cannot be criminally though he may be civilly responsible. A lunatic or madman, incapable of distinguishing between right and wrong, though not a fit object of penal visitation, is nevertheless liable to be indicted for the publication of a libel : but a party who publishes a libel without knowledge of its contents, may excuse himself, provided his ignorance were not in itself culpable ; as where a servant delivers a sealed letter without knowledge of its libellous quality, in obedience to the command of his master, and without any reason for supposing the order to be illegal. But where the act is knowingly and intentionally done, it is plain, that the mere absence of an actual intention to injure, cannot absolve from criminal responsibility, when circumstances are wanting which the law recognizes as supplying an absolute or conditional justification.

Presumption
of law that
the Defendant
intended the
consequences
which follow.

In a case which was one of an information against the defendant for falsely and maliciously publishing a libel asserting that the King was afflicted with mental derangement ; the jury having inquired of the court whether, in order to convict the defendant for the publication of a libel, a malicious intention must not have existed in his mind : the Chief Justice answered, that a person who publishes that which is calumnious, concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can show the contrary ; and the onus of proving the contrary lies upon him (*a*).

Under the Libel Act, 1792 (*b*), upon the trial of any indictment or information for making or publishing a libel, the jury

(*a*) *R. v. Harrey*, 2 B. & C. 257 ; (*b*) 32 Geo. III. c. 60.
and *vide* 2 St. Tr. (N. S.) 2.

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may give their verdict upon the whole matter put in issue ; and therefore they may take into their consideration the *intention* of the party accused of publishing a libel (c). But the intention of such party cannot be stated or explained by himself (d). Whenever the intention is in issue it is entirely a question for the jury. And so, where on the trial of an information for the publication of a seditious libel, the jury were directed that the question whether it was published with the intention alleged in the information, was peculiarly for their consideration ; that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication or any other circumstances ; that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce : that if they should be of opinion that such was the intention of the defendant, then it was the duty of the judge to declare that in his opinion such a paper, published with such an intent, was a libel ; leaving it, however, to them to find whether it was a libel or not. And such, after elaborate argument, was held, *per totam curiam*, to be a correct mode of leaving the question to the jury under the statute 32 Geo. III. c. 60, s. 1 (e).

Intention a
question for
Jury.

And on an indictment for sending a letter threatening to accuse the person to whom it is sent, of an infamous crime, statements made by the sender as to what he meant by the accusations contained in the letter, are admissible in evidence against him (f).

Statements by
the Publisher
of a Libel.

Where a publication with a specific intention is alleged, such intention must be proved accordingly. Where, therefore, a letter is alleged to have been written and sent with intent to provoke the party to whom it has been sent, to commit a breach of the peace, such intent must be proved as laid. So too where the publication is averred to have been made with intent to defame particular magistrates, or to bring the administration of justice into contempt. But allegations of intent are usually divisible, and where two distinct intents are charged, either of which would support the indictment, it is sufficient to prove one of them (g).

Where a
specific inten-
tion is alleged.

To provoke a
breach of the
Peace.

Divisible
Allegations

(c) *Vide* 5 T. R. 441, 444 ; and *The King v. Barracrough*, 1 K. B. (1906), C. C. R. 201, per Darling, J., at p. 212.

(d) *The King v. Pownall*, 2 Barnard. 102 ; Kelynge, 58, pl. 2.

F.S.

(e) *The King v. Burdett*, 4 B. & Ald. 95, 120.

(f) *Reg. v. Tucker*, 1 Mood. C. C. R. 134.

(g) *R. v. Erans*, cor. Bayley, J.

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With intent to
Injure the
Prosecutor in
his Profession.

Where the indictment alleged the publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney; it was held that the mere proof of a publication to the prosecutor only, did not support the indictment; and that the publication ought to have been averred to have been made with intent to provoke and excite the prosecutor to commit a breach of the peace (*h*).

CHAPTER XXXV.

EVIDENCE FOR THE DEFENCE, ON THE TRIAL OF
INDICTMENT OR CRIMINAL INFORMATION.*Defendant's Proofs.*

Defendant himself now a competent Witness.

Publication through the agency of another.

Booksellers, Newspaper Proprietors and Publishers, defence to criminal proceedings for libel.

Doctrine and principle of criminal liability.

Evidence to rebut prima facie case of publication by master or employer.

Rebutting evidence as to intent, &c.

Important distinction as to justification in civil and in criminal proceedings. Truth of the libel, how available as a justification.

Conditional privilege as applied to civil and criminal liability.

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Defendant's
Proofs.

As to the general evidence in support of the defence, it is competent for the defendant to adduce any such in contradiction of that which has been adduced on the part of the prosecution. He may disprove the fact of publication, or he may show that he was not concerned in the composing, writing, or publishing the libel; and he may negative the material facts averred, or the truth of the innuendoes; as by evidence which shows that the matter complained of did not relate to the defendant as alleged in the indictment or information (*a*).

Defendant
himself, now a
competent
witness.

By the "Law of Libel Amendment Act, 1888" (*b*), every person charged with the offence of libel, before any court of criminal jurisdiction, and the husband or wife of the person so charged, are made competent, but not compellable, witnesses, on every hearing at every stage of such charge.

Publication
through the
Agency of
another.

In the case of the publication of a libel through the agency of another; a man cannot be guilty, by his agent, of an illegal

(*h*) *R. v. Wegener*, 2 Starkie's C. 245; cor. Abbott, C.J.

(*a*) *R. v. Horne*, 2 Cowp. 672, 675;

and vide *In re Lord Ronald Gower*, *supra*, p. 495.

(*b*) 51 & 52 Vict. c. 64, s. 9.

act, so as to be held criminally responsible for that act, unless CHAP. XXXV. he has given the agent authority, express or implied, to do the illegal act.

It was laid down by a distinguished judge (c) as a clear proposition of law, that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal unless a great deal more is shown, *i.e.*, unless it is shown that the principal directed the agent so to act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be his general agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of his employer.

And accordingly, the defendant may prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel without knowing its contents, or delivered one paper by mistake for another (d). So in an action of libel, it appeared that five packets addressed to individuals and enclosed in one addressed to the defendant, had been received at the coach office where the defendant was porter, and that he delivered them; it was ruled, that if the jury found that he did so in the course of his business, and in ignorance of the contents, he was not liable; but, being *prima facie* liable, it was for him to show such ignorance (e).

Booksellers, newspaper proprietors, and publishers, are *prima facie* liable, criminally as well as civilly, for the acts of their servants or agents in the publication or sale of books and papers containing libellous matter. But this *prima facie* criminal responsibility may be rebutted, on proof that they were in nowise cognizant of the libellous matter, and did not authorise, sanction, or procure the publication thereof; and were not guilty of a want of due care or caution in the conduct of their business, tending to the production or sale, of the book or other publication containing the libel. Booksellers, Newspaper proprietors and Publishers, defence to criminal proceedings for libel.

The law has not, however, been uniformly administered in accordance with the text above stated. It having been ruled in several cases (now no longer law), that booksellers and newspaper proprietors stand in an anomalous position as

(c) Lord Wensleydale, 6 H. L. Cas. 54, per Patteson, J.; and see *Emmens v. Pottle*, 16 Q. B. D. 354; 55 L. J. 793.

(d) 4 T. R. 127, 128.

51.

(e) *Day v Bream*, 2 Moo. & Rob.

CHAP. XXXV. regards responsibility for the acts of their servants and agents ; inasmuch as they are liable *criminally*, as well as civilly, for libels sold in their shop in the usual course of business, though such proprietors were entirely unconscious that the publication contained any such libellous matter ; and although it was sold during their absence, and without their authority. It was said, that "although actually ignorant they were legally cognizant." The anomaly was not grounded upon a presumption of their knowledge of, and consent to, the publication ; for if so this presumption, like all others, would be liable to be rebutted by evidence that they had no such knowledge, and that they gave no such consent. But it appears to have rested upon the ground that it is the duty of every one who, however remotely, shares in the profits of a printed publication, to take care that nothing libellous is inserted therein ; and that, for reasons of public policy, the neglect of that duty renders such a person *criminally* punishable. And so it was ruled, that the fact of the party's entire ignorance, was no answer to an indictment or information. And where the libel was contained in a newspaper or other periodical publication, proprietorship has been ruled to be *conclusive* evidence of publication, on the trial of an indictment or information against such proprietor : whether he knew of or authorized the insertion of the libel or not. And so, in several cases, proprietors residing at a distance and taking no part in the publication, and who could not possibly have been cognizant of the libel, were, notwithstanding those facts appearing in evidence upon the trial, convicted and punished as libellers (*f*). But those cases have always been questioned, as contrary to the principles of the English law,—that no man should be convicted of a crime of which he was unconscious.

Doctrine and principle of criminal responsibility.

The true doctrine and principle of *criminal* responsibility for the publication of a libel is stated in *Lamb's case* (*g*), one of the earliest authorities on the subject ; in which it was resolved by the Court of Star Chamber, that every one who shall be convicted of the offence of publishing a libel, ought to be either a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it knowing it to be a libel.

The first reported cases in which the above authority appears to have been disregarded, were three consecutive cases tried before Lord Raymond, C.J., in the year 1729, all for the same

(*f*) See the cases, *Rex v. Elizabeth* v. Cutheh, and *Rex v. Gutch and others*, *Nutt, infra* ; also *Rex v. Walter*, *Rex* (*g*) 9 Co. Rep. 59.

libel, which was one of a *treasonable* nature and dangerous tendency at that time. In the first, the defendant was tried on an information charging him with printing and publishing "an infamous and seditious libel" upon the King, impugning his title to the throne, questioning his legitimacy, and putting forth the claims of the Pretender. The charge against the defendant was, of printing one of the papers; but the evidence produced showed that he acted merely as a servant to the printer, and his business was only to clap down the press; and few or no circumstances were offered of his knowledge of the import of the paper, or of his being conscious of doing anything illegal; and it was urged that what the defendant had done was in ignorance and in obedience to his master's authority. But such was ruled by Lord Raymond, C.J., to be no excuse; and the jury were directed that the fact of printing and publishing *only* was in issue: and the defendant was convicted (*h*). In the next case, for the same libel, an information was exhibited against one of the printer's compositors. The same learned judge directing the jury that, although there was no evidence of publication by the defendant, yet that he, as compositor of the types and figures, might be found guilty of the printing of the libel; and accordingly, the defendant was convicted (*i*). In the third, also for the same libel, an information was exhibited against the defendant (a woman) who kept a pamphlet shop: she lived a mile from the shop and was bed-ridden, and knew nothing of the libel having been on sale or sold at her shop. But Lord Raymond, C.J., directed the jury that, notwithstanding, the defendant is guilty of publishing this libel, the shop being kept under her authority and direction (*k*).

Neither of the three cases mentioned are law at the present day. It is indeed very questionable if they ever were law. Those rulings stood however, upon the books, as mischievous precedents, upwards of a century afterwards; being followed in several cases, chiefly in prosecutions by the Attorney-General

(*h*) *Rex v. Clerk*, 1 Barnardiston, 304.

(*i*) *Rex v. Knell*, 1 Barnardiston, 305.

(*k*) *Rex v. Elizabeth Nutt*, 1 Barnardiston, 306; Fitzgibbon, 47; and see *Rex v. Dodd*, 2 Sess. C. 33. According to the report of Elizabeth Nutt's case in Barnardiston, the Lord

Chief Justice observed, that "if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read." It is impossible not to dissent from this doctrine so expressed, without the qualification that the servant had some reason to know that he was discharging an illegal mission.

CHAP. XXXV. of the day, for libels upon the Government and its ministers; and in some cases of defamatory libels upon private individuals, published in newspapers and pamphlets: and this notwithstanding that the true doctrine was again stated in a subsequent case, *The King v. Almon* (l), by Lord Mansfield, C.J., and Justices Aston, Willes, and Ashhurst, all of whom laid it down, in accordance with the earlier authorities (m), that evidence of a pamphlet having been bought in the shop of a bookseller and publisher, is but *primâ facie* evidence of a publication by the master himself; and is liable to be contradicted by evidence to the contrary, tending to exculpate the master, by showing that he was not privy, nor assenting to, nor encouraging it. But that the *primâ facie* evidence stands good until answered by the defendant. In the subsequent case of *The King v. Walter* (n), which was a criminal information against the defendant, as proprietor of "The Times" newspaper, for a libel on the late Lord Cowper; it was proved on the part of the defendant, that although he was in fact the proprietor of the paper, he had nothing to do with the conducting of it; that he resided entirely in the country, and that the paper was conducted without any interference on his part. But Lord Kenyon, C.J., ruled that the proprietor of a newspaper was liable criminally, as well as civilly, for the acts of his servants or agents, in misconducting a newspaper. In another case before the same learned judge, *The King v. Cuthel* (o), a highly respectable bookseller in London, who dealt almost exclusively in classical works, and had published the philological writings of the Revd. Gilbert Wakefield. That eminent scholar being the author of a political pamphlet, in answer to one by the Bishop of Llandaff, employed Mr. Johnson of St. Paul's Churchyard to publish it; but some copies were sent to Mr. Cuthel's shop, and his servant, without authority, sold a few of them. As soon as Mr. Cuthel was aware of the nature of the publication he stopped the sale of it. Nevertheless, in addition to criminal informations against the author and publisher, a criminal information was filed against Mr. Cuthel. The pamphlet contained some charges of misconduct against the existing Administration, with an exaggerated picture of the deplorable condition to which the country was reduced. At the trial, it was contended that

(l) 5 Burr. 2688.

(m) See *Lamb's case*, *supra*.

(n) 3 Esp. 21.

(o) Guildhall, Feb. 21st, 1799; 27 How. St. Tr. 641, 675; and see *Erskine's Speeches*, Vol. 5, 213-246.

the defendant was not criminally responsible, having been ignorant of the contents of the pamphlet, and the publication having been without his authority. But Lord Kenyon directing the jury as he had done in other cases, that proof of the sale of the pamphlet at the defendant's shop was conclusive evidence against him, that it was no defence that he was ignorant of the contents of the pamphlet, nor that the sale of it was without his authority. And under this direction the defendant was found guilty (p). CHAP. XXXV.

And in a subsequent case, in which a criminal information had been filed by the Attorney-General against the defendant, for a seditious libel published in the "Morning Journal" newspaper, it was proved on the part of the prosecution, that the defendants were proprietors of the newspaper; and the article charged as libellous was then read. No other evidence was offered. It was then proved on behalf of one of the defendants, that at the time of the publication, he was confined to his house by illness, more than a hundred miles from London; and that he took no part in the publication of the newspaper, which was conducted by the managing proprietor (one of the other defendants). And it was contended (q), therefore, that under the circumstances, it was impossible to infer a criminal participation, inasmuch as the defendant could not but be ignorant of the nature and character of the particular article. That the notion that a proprietor of a newspaper is necessarily responsible *criminally* for the act of his partner or agent, was against the universal principle of criminal law, that a malicious intention is essential to constitute guilt in the agent, whatever the act is. But it was ruled, by Lord Tenterden, C.J., that "a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears; and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. That it would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether" (r).

(p) *Vide* 27 How. St. Tr. 738.

(q) By Mr. F. Pollock, afterwards Lord Chief Baron.

(r) *Res v. Gutch and others*, 1 Moo. & Mal. 437. As to the ruling of the learned judge that the publisher or

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Evidence to
rebut *prima*
facie case of
publication by
master or
employer.

As already observed, the law as laid down in these cases has frequently been questioned, and finally met with so much disapprobation (*s*) that in the year 1843, a statute was passed (*t*), by the 7th section of which it is enacted, that, "whenever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

The effect of this enactment was, to restore (or rather to declare) the law as it had been resolved in *Lamb's case* (*u*), and as it was laid down by Lord Mansfield, C.J., and his colleagues in *The King v. Almon* (*x*).

Although the statute above referred to, was passed so long ago as the year 1843, it was not until the year 1877 that a defence was raised (by the author of this work) and argued under the 7th section above quoted. In the case referred to, a criminal information had been granted against three defendants, proprietors and publishers of a newspaper called "The Portsmouth Times," for a libel upon the Town Clerk of Portsmouth, conveying an imputation upon him of having been influenced by party politics in the selection of the jury for the trial of cases at the Borough Quarter Sessions; at which a trial arising out of election matters was pending. On the trial of the criminal information it was proved, that the literary department of the newspaper in question, had been entrusted to an experienced editor; who was appointed by the defendants, with general authority to conduct the paper, and to insert in it what he in his discretion thought fit in the way of articles, correspondence, &c.; that of the three defendants, each took the management of a particular department of the business other than that of the literary department; that at the time of publication of the libel, one of them was absent

proprietor "might remain behind and escape altogether;" it should be observed, that the proprietor is, and always was, liable *civilly* (*i.e.*, to an action at law), although the libel be published without his knowledge or authority.

(*s*) *Vide* the observations of Lord

Campbell, and of Lord Denman, C.J., in the Ho. of Lords, in the debate on the Libel Bill: Hansard, Vol. LXVI., p. 404.

(*t*) 6 & 7 Vict. c. 96.

(*u*) *Supra*.

(*x*) *Supra*, p. 502.

from home on account of ill health, and that neither of them CHAP. XXXV.
 had given any authority for or consent to the publication complained of; nor had they any knowledge of the libellous article until attention was called to it after the paper was in circulation; and there was no evidence of the sale of the paper containing the article, after it had been brought to their knowledge. The defendants relied on the section above stated of the Libel Act, 1843 (*y*); and it was submitted on their behalf, that the jury should be asked whether the publication of the libel was, or was not, made without their authority, &c., within the meaning of that section. But it was ruled by Lindley, J., that as it was admitted that an authority had been given by the defendants to their editor, to insert what he thought fit, in the newspaper without supervision or control, such amounted to an actual authority; and therefore that the statute had no application to such a case; and accordingly, he directed the jury to find all the defendants guilty. This was afterwards held, by the majority of the Court of Queen's Bench, to be a misdirection; and that upon the evidence given, the question ought to have been submitted to the jury whether, within the words of exemption in the statute, the defendants, or either of them, were criminally responsible for the publication of the libel; and a new trial was granted (*z*). At the second trial, before Grove, J., the question submitted to the jury was whether or not the general authority given to the editor, did not include an authority to publish the libel: that as the defendants took the benefit of the services of their editor, they must take the *onus* of his acts; that they had no business to appoint a man and rely upon his discretion, so as to shirk responsibility. And the jury having, upon this direction, found all three defendants guilty; upon motion for a new trial, it was held, by the majority of the court, that inasmuch as the "authority" mentioned in the statute, meant an authority to publish *the libel*; and as a general authority to an editor to conduct the business of a newspaper, must in the absence of anything to give it a different character, be taken to mean an authority to conduct it according to law: and whether within the words of the section, it was proved that the publication in question was without the authority, consent or knowledge of the defendants, or either of them, should have been submitted to the jury (*a*).

y) 6 & 7 Vict. c. 96, s. 7.

others, 3 Q. B. D. 60; 47 L. J. 35.

(*z*) *The Queen v. Holbrook and*

(*a*) *The Queen v. Holbrook and*

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It should be observed, that the word "publication," wherever it occurs in the section, points to the *libel*, not to the newspaper. The words of the section are, "whosoever upon the trial of any indictment or information *for the publication of a libel*." It applies, therefore, to libels however published, whether in a newspaper, book, pamphlet, or otherwise.

As to what amounts to a "want of due care or caution" within the meaning of the statute, is a question for the jury upon the facts and circumstances of each particular case.

A proprietor or publisher of a newspaper, who employs a competent editor, would not be guilty of a want of due care or caution on the ground merely that he did not read the newspaper through, before publication, to see that it contained no libel.

Evidence in contradiction, exculpation, or excuse.

The defendant was at liberty, even before the Libel Act, 1843, to show that although he was the printer or publisher of the paper containing the libel, yet he was not privy to the publication of the libel, nor assenting to it in any way: and evidence was admissible in contradiction of a *prima facie* publication, and in exculpation, or excuse (*b*).

Evidence of authority to publish a libel.

Where the defendant related to the editor of a newspaper a story defamatory of K., and asked the editor to "show up" K. The editor then communicated the story to a reporter for the paper. The story afterwards published in the paper was substantially the same as that related by the defendant to the editor; and after publication the defendant expressed his approval of it. This was held to be evidence for the jury of an authority to the editor for the publication of the libel which appeared in the newspaper: and notwithstanding that there were some additions and comments, by the editor, yet the defendant having requested the editor, generally, to write and publish a libel of K., the defendant must be answerable for a libel written in pursuance of his request, which was substantially identical with that which he desired to be published (*c*).

Evidence that the writing is not a Libel: and that intention not such as alleged.

The defendant may prove that the writing in question is not libellous; and for that purpose a defendant has been allowed to give in evidence other passages in the same news-

others, 48 L. J. 113; 4 Q. B. D. 42. per Cockburn, L.C.J., and Lush, J. (Mellor, J., *dissentiente*).

(*b*) *Vida Res v. Almon*, 5 Burr. 2688, and the judgments of Lord

Mansfield, C.J., and Justices Aston, Willes, and Ashhurst, in the same.

(*c*) *The Queen v. Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

paper or publication, plainly referring to the subject of the libel, or fairly connected with it, though disjoined from it by other matter and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution; or that the passage in question would not fairly bear the construction attempted to be given to it (*d*). CHAP. XXXV.

The defendant may give in evidence any facts to rebut the proofs given in support of the prosecution, as to the circumstances and intention of the publication: and though no such proofs be given on the part of the prosecution, yet the defendant may give evidence to rebut the presumption of a mischievous intention which the law infers from the publication of libellous matter. And where the defendant was indicted for publishing a seditious libel, with intent to inflame the minds of the labourers and working people in England, and to incite them to acts of violence, riot and disorder, and to the burning and destruction of corn, grain, machines, and other property; it was ruled, by Lord Tenterden, C.J., that the evidence of persons acquainted with the defendant as to his general character, and as to his opinions on subjects connected with the alleged libel, might be received in evidence in his behalf, for the purpose of showing the general character of his publications and opinions on such subjects (*e*). And so also for the same purpose, a printed copy of a report of a speech made by the defendant nine years previously and published at the time (*f*). Rebutting evidence as to intent, &c.

There is an important distinction between justifications in civil and in criminal proceedings for libel. In the former, it has already been seen, that the truth of the defamatory matter was always a ground of justification; in the latter, it never was until the Libel Act, 1843. The reason why the truth of the libel is no defence to a criminal prosecution is, that its publication may provoke a man to a breach of the peace; and therefore whether the thing complained of be true or false it may equally tend to a breach of the peace; and accordingly the mere truth of the libel will not excuse its publication; for the *tendency* of the defamation to produce a breach of the peace, is of the essence of the offence as far as the public are concerned; and therefore, the truth or falsity of the publication is collateral to Important distinction as to justification in Civil and in Criminal Proceedings.

(*d*) *R. v. Lambert and Perry*, 2 N. S. 789, cor. Lord Tenterden, C.J.
Camp. 398, 400.

(*f*) *Ibid*.

(*e*) *The King v. Cobbett*, St. Tr. 2

CHAP. XXXV. the offence; and it is obvious that the imputation may be not the less malicious or provoking because it is true.

Truth of the Libel how available as a justification.

By the Libel Act, 1843 (*g*), a defendant, on the trial of an indictment or information for a *defamatory* libel (*h*) may plead the truth of the libel in manner therein mentioned; and the truth of the matter charged may then be inquired into at the trial, but will not amount to a defence, unless it be shown that it was for the public benefit that the matters charged should be published. And by the same section it is provided, that the truth of the matters charged in the alleged libel, can in no case be inquired into without such plea of justification.

Truth of libel not available, when?

It will be observed that the truth of the libel, upon a criminal charge of publication, is only available as a defence under the statute; and in order to make it so available, the statutory requirements must be strictly complied with. In no other case can the truth of a libel be set up as a defence to a criminal prosecution, whether such prosecution be by indictment or by criminal information.

The whole of the Plea must be proved :

Where a justification is pleaded under the above section, to an indictment for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all, and is traversed generally, if the evidence fail as to any one of them the verdict will be entered generally against the defendant. Therefore where, upon the trial of an issue, upon a plea justifying the whole of such a libel, evidence was offered in support of some only of the imputations, and the jury found that one only was proved, the verdict was entered for the Crown on that issue generally; and the court, on an application afterwards for a new trial, on the ground that the finding as to the other issues was against the weight of evidence, refused to grant it (*i*). But where the libel is general in its terms, if the plea of justification be proved in substance and in fact, it will be sufficient to sustain a verdict for the defendant on that plea (*k*).

partial finding insufficient.

That it was for the Public Benefit.

But the truth of the libel is no defence, unless it was for the public benefit that the matters charged should be published. It is to be observed that in a plea of justification under the statute (*l*), alleging the truth of the libel, it must also be

(*g*) 6 & 7 Vict. c. 96, s. 6.

(*h*) The statute does not apply to a seditious, blasphemous, or obscene libel.

(*i*) *R. v. Newman*, 1 E. & B. 558;

22 L. J. Q. B. 156.

(*k*) The Queen on procs. *Lambri v. Labouchere*, 14 Cox, C. C. 432, per Cockburn, L.C.J.

(*l*) 6 & 7 Vict. c. 96, s. 6.

alleged that it was for the public benefit that the matters charged should be published; and, further, the particular fact or facts by reason whereof it was for such public benefit. And if the defendant fail to prove this latter part of his plea, although he prove the truth of the matters charged, it will be no sufficient justification under the statute; and the verdict must be for the Crown (*m*). It would therefore appear that in many cases, although the defendant may be able to prove the truth of the libel, he will find a difficulty in establishing a defence to the satisfaction of the jury, on the ground of any "public benefit" that could arise by the publication.

The plea of justification to an indictment for the publication of a libel cannot be treated as distributive: it is one and entire; raising only one issue; and unless the whole plea is proved, that issue must be found for the Crown. There can be no partial finding for the defendant on the ground that the justification is partially established (*n*).

The plea cannot be treated as distributive.

It is not competent to the defendant to show that others have published similar papers without having been prosecuted (*o*). And where, to a criminal information for a libel, the defendant has justified under the above section, he will not be permitted to prove, in support of his plea, that the same charges were previously published in another publication, and that the prosecutor took no steps against the publisher; and that therefore the inference is that they were true (*p*); for such persons have no opportunity given them to defend themselves; and one defendant cannot excuse himself by showing that others have also been criminal.

Previous or similar, Publication by another, no Defence.

It will be observed that the statute does not take away or prejudice any of the defences which were previously available under the plea of *Not Guilty*. Therefore any defence that might have been made under the general issue, before the passing of the statute, is available still: the statute expressly provides, that *in addition* to the plea of justification allowed by that Act, it shall be competent to the defendant to plead a plea of *Not Guilty*.

Justification and "*Not Guilty*" may be pleaded to same Indictment.

Where on the trial of a criminal information, for the publication of a libel in a newspaper; the libel was contained in what professed to be a comment on the verdict of a coroner's jury, imputing that the death was not a suicide but a murder:

That Defendant mis-led as to facts, inadmissible.

(*m*) *R. v. Newman, supra.*

(*n*) *Ibid.*, 1 E. & B. 577.

(*o*) *R. v. Holt*, 5 T. R. 436.

(*p*) *R. v. Newman*, 1 E. & B. 268 ;
22 L. J. Q. B. 156.

CHAP. XXXV. it was proposed, on behalf of the defendant, who was the publisher of the paper, to call the editor, and also the writer of the article, to prove that they had been mis-led as to the facts, and had no intention of imputing crime to the relator: Cockburn, L.C.J., after conferring with his colleagues, rejected the evidence; stating, that it could not be permitted that the libel should be construed by anything but its terms. But that if the defendant should be found guilty, the matters might be deposed to by affidavit, in mitigation of punishment, on coming up for judgment (q).

Although the whole of the publication containing the libel is not set out in the indictment, or information, yet if any part qualifies the rest, it may be given in evidence (r).

Conditional
Privilege as
applied to
Civil and
Criminal
Liability.

No man is punishable as a criminal, for a publication made on an occasion which the interests of others, or even his own, fairly required him to make; though its contents may convey an imputation on the character of another; provided such a publication was called for by the exigency of the occasion, and was made *bonâ fide* with a view to the occasion, without malice. And here the boundaries of criminal as well as civil liability are identical.

Many instances have already been cited in illustration of the operation of the same principle on the question of civil liability; it is therefore unnecessary to repeat them, for the question of civil and criminal liability, in the case of libels reflecting on individuals, seems in this class of cases to be identical; whenever the publication of such a libel is criminal as concerns the public, it constitutes a civil injury repairable in damages at the suit of the party calumniated. It is, however, important to observe, in respect of this class of cases, where the intention of the publisher is the test of civil or of penal liability, that with a view to exemption from criminal as well as civil responsibility, the mere abstract intention of the party cannot protect him, in the absence of facts, which constitute an occasion recognized by the law. The law allows no man to defend himself by saying, "I did an act, in itself injurious, mischievous, and illegal, but I did it with an excellent intention." And it must also be remarked, that a publication not warranted by the nature and exigency of the occasion, cannot be justified in a criminal, any more than in a civil proceeding; for if the occasion does not justify or excuse the act, neither, on the

(q) *The Queen v. Tanfield*, Sittings at N. P. Easter, 1878, M.S.

(r) 2 Salk. 417; and see *The Queen v. Crowe*, 3 Cox, C. C. 123.

principle just adverted to, can mere abstract good intention supply a sufficient defence. CHAP. XXXV.

By the statute for amending the law of evidence and practice on criminal trials (*s*), a party producing a witness is not allowed to impeach his credit by general evidence of bad character; but he may in case the witness, in the opinion of the judge, prove adverse, contradict him by other evidence: or, by leave of the judge, prove that he has made, at other times, a statement inconsistent with his present testimony: but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (*t*). How far witnesses may be discredited by the party producing.

Matters available in mitigation of punishment are usually reserved till after the trial, and are exhibited to the court upon affidavits (*u*). In some instances, however, such evidence is receivable at the trial. Thus, evidence has been received to show that the defendant, when proceedings were instituted, stopped the sale of the obnoxious work (*x*). Evidence in Mitigation.

Criminal proceedings against persons for publishing libels of individuals may be compromised either by the payment of money, or by apology (*y*), or by both. Compromise of Libel.

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PROCEEDINGS INCIDENT TO THE TRIAL OF INDICTMENT OR CRIMINAL INFORMATION FOR LIBEL.

Trial by Indictment for Libel.

Notice of trial when Indictment removed by Certiorari.

Crown Office Rules as to.

Provisions of Fox's Libel Act as to Trial.

Construction put upon the statute by the Court.

What are questions of fact for the Jury, and what of law for the Judge.

Occasion and circumstances of publication.

Direction to the Jury as to malice.

Verdict: not conclusive, when.

AFTER the finding by a grand jury, of a "true bill" against the defendant, the indictment is tried in the ordinary course, CHAPTER XXXVI.

(*s*) 28 & 29 Vict. c. 18, s. 3 (1865).

(*t*) *Ibid.*, and *vide* ss. 4, 5, and 6.

(*u*) *Vide infra*, p. 525.

(*x*) *R. v. Hone*, Manning's Ind. 198.

(*y*) *Fisher and Co. v. Apollinaris Co.*, L. R. 10 Ch. App. 303, per Mellish, L.J. Trial by Indictment for libel.

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before a petit jury, unless a certiorari be obtained for the removal of the indictment into the King's Bench Division (a), in which case it may be, and usually is, tried before a special jury; either at the assizes for the county in which the libel was published, or on the Crown side of the King's Bench Division in London, at the Royal Courts of Justice.

Libels are not triable at Quarter Sessions.

Formerly an indictment for libel might have been tried at Quarter Sessions before justices of the peace (b), but now the offence of composing, printing, or publishing blasphemous, seditious, or defamatory libels, is not triable at any Quarter Sessions (c). And, upon an application to the Court of Queen's Bench in Ireland for a mandamus, that court refused to grant such a writ to justices at Quarter Sessions, commanding them to charge the grand jury with, and to try, an indictment for a libel (d).

Venue for trial.

Crime is, in a legal sense, local, and according to the law of England a man must be tried where the offence with which he is charged is alleged to have been committed. There are indeed exceptions to this rule. Some offences, from their very nature, may be said to be committed at the same time in more counties than one. If a man, intending to publish a libel, puts it into the post in London, with the intention that the libel shall be opened and read in another county, he may be charged and tried either where he commits the libel to the public means of communication and despatch, or in the county where it sees the light, and is, practically speaking, published (e).

Notice of Trial when Indictment removed by Certiorari.

The time for giving notice of trial of an indictment for libel, removed by certiorari into the King's Bench Division, is now regulated by the Crown Office Rules, 1906, and is the same in the case of an indictment as in that of a criminal information. The statute of 4 & 5 Wm. & M. c. 18, makes provision against any prolonged or unnecessary delay in bringing an information to trial.

Crown Office Rules as to.

If the prosecutor or relator does not, within six weeks after issue joined, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may give such notice, and when the defendant is bound by recognizance

(a) As to the proceedings on application for *certiorari*, *vide* the C. O. R. 1906, rr. 20-23.

(b) Hawk. P. C. cap. 8, sec. 88; *R. v. Summers*, 1 Lev. 193.

(c) 5 & 6 Vict. c. 38, s. 1.

(d) *Re Armstrong*, 14 Ir. C. L. R. 97; 9 Cox, C. C. 342.

(e) *Vide The King v. Burdett*, 4 B. & Ald. 95.

to give notice of trial the prosecutor may, in all cases, give notice by proviso (f).

Ten days' notice of trial must be given unless a longer notice shall be ordered by the court or a judge, or the party to whom it is given shall consent to take short notice, which shall be four days, or any longer period (g).

Notice of trial for London or Middlesex shall not be or operate as for any particular sittings, but shall be deemed to be for the day stated in the notice, or for any day after the expiration thereof on which the record may come on for trial (h).

Notice of trial elsewhere shall be deemed to be for the first day of the then next assizes, at the place for which the notice of trial is given (i).

The trial of the defendant for libel, whether on an indictment or a criminal information, is (with the exceptions mentioned below) conducted in the same manner in the one case as in the other. The defendant must be tried by a jury of the county in which the offence was committed. The trial on a criminal information is usually taken before a special jury. But where the information has been filed *ex officio* by the Attorney-General, that officer is entitled to have the case tried *at bar* if he applies for it to be so tried (k).

Conduct of the Trial.

In the preamble to the Libel Act, 1792 (32 Geo. III. cap. 60), it is recited that doubts had arisen, whether, on the trial of an indictment or information for the making or publishing of any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury empanelled to try the same, to give their verdict upon the whole matter in issue. It is then declared and *enacted*, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

Provisions of the Libel Act as to trial.

Jury may give a general verdict :

but not to find Defendant guilty on mere proof of publication.

(f) C. O. R. 1906, r. 138.

(g) *Ibid.*, r. 139.

(h) *Ibid.*, r. 141.

(i) *Ibid.*, r. 142.

(k) 1 Str. 644. As to application for, and proceedings on "trial at bar," see the C. O. R. 1906, rr. 150 to 155.

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How the Jury
must be
directed.

By sec. 2 it is provided, that on every such trial the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

May find a
special verdict.

By sec. 3, the jury are empowered to find *a special verdict*, as in other criminal cases.

Motion in
arrest of
judgment.

And by sec. 4, if the defendant be found guilty he may move in arrest of judgment, as before the passing of the Act.

Observations
upon this
statute.

It is observable, that the first clause in the statute is, so far as regards the giving a general verdict, merely *declaratory*; placing informations and indictments for libels on the same footing as those for any other offences. The latter branch is, in its terms, purely negative and restrictive, and, except that it amounts to a legislative disapproval of the directions which had been given to juries in particular instances, is rendered unimportant by the subsequent clause which directs, affirmatively, what the court or judge *shall* do on such trials. This (the second) section provides, that the court or judge shall, according to their or his discretion, give their or his opinion on the matter in issue, in like manner as in other criminal cases. It is, therefore, observable that the object of the legislature was to remove all anomalies and peculiarities by which trials for libels were distinguished from those for any other offences. Now, the principal peculiarity, and that on which the difference in practice originated, was this: that in the case of libel, the alleged libel was stated on the record: on which account it was unnecessary to decide at the trial upon the quality of the matter published. But, by the express provision of this clause, the jury are to be directed *as in other criminal cases*; and in other criminal cases the ordinary course is to advise and direct the jury as to the criminal quality of the transaction, supposing the facts to be proved. It seems therefore to follow, that the court or judge is bound to give an opinion on the legal quality of the alleged libel, as stated on the record, and the jury are not to convict without the previous sanction of the judge's opinion that the act is criminal; though, in some instances, they had been required to convict where they were satisfied as to the fact of publication and the truth of the averments. The opinion and direction to the jury are to be given *on the matter in issue*; by these terms it is not, it seems, to be understood that the court or

judge is called upon to give any opinion or direction in the affirmative or negative upon the whole of the issue, but only, as in other cases, conditionally and hypothetically upon the law, as it arises on different branches of the evidence. The third section seems to have been introduced merely for the purpose of repelling any inference which might otherwise have arisen from the terms of the first, that the jury were *bound* to give a general verdict. The fourth section seems to have been suggested by some apprehension, that, without an express clause to that effect, the defendant might be considered to be excluded from objecting that the alleged libel, as stated on the record, was not in itself illegal, and that the publishing of it was not criminal. It seems, therefore, that the legislature meant to leave the question, whether the matter published amounted to a libel, as before, a question of law; it being expressly provided that the defendant may still move in arrest of judgment on such ground as he might have done before: and as, before the statute, the defendant might certainly have arrested the judgment on the ground that the matter published was not libellous, it seems that no alteration was intended to be made in this respect; but that the objection, that the matter published was innoxious, as it stood on the record, was still available. But whilst this is the case, it is obvious that the question must remain a question of law; a general acquittal would be conclusive, as in all other cases; but the finding of the jury, as to the mere criminal quality of the alleged libel, either by a general verdict of guilty or by a special verdict, must be immaterial, so long as the objection may be taken to the record itself, that it charges no libel in point of law, notwithstanding the finding of the jury in fact (*l*).

With regard to the construction to be put upon this statute; it was observed by Abbott, L.C.J., in his judgment in a case which underwent considerable argument, “If the judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that if it be so in their opinion, the publication is an offence against the law.” . . . “The statute was not intended to confine the matter in issue exclusively to

Construction
put upon the
statute by the
Court.

(*l*) See *R. v. Holt*, 5 T. R. 436; and *Henty*, 7 App. Cas. 741, and *supra*, see *The Capital and Counties Bank v.* pp. 316-7.

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the jury, without hearing the opinion of the judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the judge" (m).

And Best, J., observed in the same case, that it must not be supposed that the statute of Geo. III. made the question of libel a question of fact; if it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel, as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does, is to prevent the question from being left to the jury in the narrow way in which it was left before that time. Judges are in express terms, directed to lay down the law, as in other cases. In all cases, the jury may find a general verdict; they do so in cases of murder and treason, but there the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion (n). And in a subsequent case of libel, Best, C.J., said: "I do not admit that, even in criminal cases, the jury are the sole judges of the law. Before the statute, their province was merely to find whether or not the innuendoes were proved, and then it was for the judge to say whether or not the publication was a libel. The statute does not transfer to the jury the authority of the judge, but it merely provides that they may find a *general verdict*" (o).

Practice under
the Statute.

The practice under the statute has therefore been, for the judge first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and this, whether the libel is the subject of a criminal prosecution or a civil action (p).

If the publication in consideration of law be libellous, then it is a question of fact for the jury whether it was wilfully and maliciously published, subject, however, to the ordinary presumption of law, that in the absence of proof to the contrary, a man intends that which is the natural consequence of the means which he employs. If collateral facts be proved in defence, it is for the court to pronounce whether they furnish

(m) *The King v. Burdett*, 4 B. & Ald. 183. 4 Bing. 195.

(n) *Ibid.*, 4 B. & Ald. 131.

(o) *Lery v. Milne*, 12 Moore, 421 ;

(p) *Parmiter v. Coupland and another*, 6 M. & W. 108 ; and *vide supra*, p. 315

an absolute defence, or a conditional one, dependent on the actual or express malice of the publisher; of the existence of which the jury are to decide. It follows, that neither the jury nor the parties have a right to expect from the court any specific and direct opinion upon the whole of the case, or any other than that which is ordinarily given at the discretion of the court to the jury in parallel cases, with respect to the verdict which they ought to find in point of law, as dependent and contingent upon their conclusions in point of fact, drawn from the alleged libel itself and all the circumstances of the case as to the meaning, motives, and intention of the defendant (q).

The offence consists in the act of publishing the matter set forth on the record, in the sense appearing upon the face of the libel itself, or in that attributed by the innuendoes, and with the intention alleged, maliciously and without any legal justification or excuse. The fact of publishing the illegal matter, and of its being published in the particular sense alleged, are ordinarily questions of fact for the jury, subject, of course, to the opinion and judgment of the court, whether the facts proposed to be proved would be, when proved, sufficient in point of law, to constitute a publication and to support the innuendoes.

What are questions of fact for the Jury, and what of law for the Judge.

Whether the defendant published the alleged libel wilfully and designedly, and whether he did so with the particular intention specified in the information or indictment, are also questions of fact for the determination of the jury. Until those facts are determined by the jury, the court cannot, otherwise than hypothetically, form any judgment on the question of guilt or innocence. On the other hand, the quality of the alleged libel, as it stands on the record, either simply or as explained by averments and innuendoes, is purely a question of law for the consideration of the court.

Intention.

Whether the publication of the libel alleged was a malicious or wrongful publication is entirely a question of fact for the jury; for, though the fact of publishing, and the illegal and noxious quality of the thing published be beyond dispute, yet the act of publication may be perfectly innocent; so far from being illegal, it may have been an act meritoriously done, for the very purposes of justice. And, therefore, as not merely a publication, but a malicious or wrongful publication must be averred, so must such a malicious and wrongful publication be

Publication must be either malicious or wrongful.

(q) See *R. v. Holt*, 5 T. R. 436; *R. v. Burdett*, 4 B. & Ald. 95.

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circumstances
of Publication.

found by the jury, either by means of a general verdict of guilty, which comprehends the whole of the charge, or by a special finding of a malicious and wrongful publication, or, at least, by negating the existence of any legal justification or excuse.

Where the circumstances and occasion of publishing are such as amount to a legal justification or excuse, independently of the question of intention, the *existence* of those facts is, of course, for the consideration and decision of the jury; but whether, when ascertained, they amount to a legal justification or excuse, is obviously a mere question of law for the opinion and judgment of the court. It is, for instance, a question of mere fact, whether the alleged libel was published by way of petition to parliament, and whether it was made according to the course and order of such like proceedings in parliament, but whether the occasion justifies a publication so made, is a question of law.

So, again, it is a question of law, whether the occasion and circumstances of the publication furnish a *conditional* justification or excuse dependent on the actual intention of the defendant; but when that is the case, and the guilt or innocence of the defendant turns upon the question, whether he acted with an evil and mischievous intention, or *bonâ fide* with a view to some legal object, the question of malicious intention is a conclusion of fact to be drawn by the jury on a consideration of the terms of the alleged libel and all the circumstances of the case. If the matter charged to be libellous were contained in a letter, sent by the defendant to the prosecutor, and the defence were, that the charges it contained were stated not with intent to provoke or exasperate, but were written for the purpose of honest remonstrance and admonition, it would be for the jury to decide, under all the circumstances, considering the situation of the parties, the conduct of the defendant and the language used, whether the act in reality originated in a sincere and honest intention, or in an evil and sinister motive which warranted a conviction.

It is clear, therefore, that in order to warrant a legal judgment of condemnation, the jury must, by their verdict, find that the act was done maliciously or wrongfully, or in such other manner as is sufficient to negative the question of any legal justification or excuse; until then, the presumption of innocence is not excluded, still less is the criminality of the act established.

Where on the trial of a criminal information for a libel contained in a newspaper, the jury having requested to be directed as to whether it was necessary that there should be a malicious intention in order to constitute a libel, Abbott, L.C.J., directed them, that, "the man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him so to show." And this was held to be a correct direction: and assuming that a malicious intention is necessary to constitute a libel, such intention is to be inferred from the mischievous tendency of the publication itself; and the onus of rebutting that inference is cast upon the defendant: and where the publication of a libel of mischievous tendency has been proved, and the defendant has not shown anything to rebut that inference, the jury are bound to find the defendant guilty (r).

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Direction to
the Jury as
to Malice.

The verdict in this, as in other criminal proceedings, is either a general verdict of condemnation, or acquittal; or a special verdict, by which the jury find the facts, and refer the questions of law to the court. For, as already shown, it is specially provided by the Libel Act, 1792 (s), that nothing therein contained shall extend, or be construed to extend, to prevent the jury from finding a *special* verdict, in their discretion, as in other criminal cases.

And although the jury find the defendant guilty, he may move in arrest of judgment; for the legislature in passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against them. And therefore, by the 4th section of the statute it is provided, that the defendant, though found guilty by the jury, shall still (as he had prior to that Act) have the power to take the opinion of the court on the question of law by moving in arrest of judgment. And accordingly although the jury should find the defendant guilty, yet he is at liberty to move in arrest of judgment; and if the court should afterwards find that the matter charged in the indictment or information is not libellous, judgment must be arrested (t).

Verdict of Jury
not conclusive,
when.

(r) *The King v. Harvey and another*,
2 B. & C. 257, 266.

(s) 32 Geo. III. cap. 60, s. 3, *supra*.

(t) *Ibid.*, s. 4; and see next Chapter.

CHAPTER XXXVII.

PROCEEDINGS AFTER TRIAL OF INDICTMENT OR CRIMINAL
INFORMATION FOR LIBEL.

Province of the Court after Verdict.
Motion in Arrest of Judgment.
Writ of Error, proceedings as to.
New Trial on Criminal Information or Indictment.
Proceedings, on Defendant coming up for Judgment.
What may be shown in Mitigation of Punishment.

Order of reading the Affidavits, on Defendant being brought up for Sentence.
Punishment on Conviction, at Common Law, and by Statute.
Costs on Indictment for Libel.
Defendant's Costs on Acquittal.
Costs where Prosecution by a Public Body.

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Province of the
Court after
verdict.

Postponement
of judgment on
Conviction.

AFTER the defendant has been found guilty on a criminal information, it is a matter of course that he should stand committed, pending the consideration of the judgment; unless the prosecutor expressly consent to his standing out upon bail (a). Unless there is some substantial cause shown to the contrary, by the prosecutor, it is usual for the judge to admit the defendant to bail, on his finding security by recognizance; himself with two sufficient sureties in such sum as the judge in his discretion may see fit to require, for his personal appearance on the day appointed, and from day to day afterwards until he receives the judgment of the court. And so also upon an indictment for libel which has been removed by certiorari into the King's Bench Division, for trial by a special jury; if a verdict of *Guilty* is returned, judgment may be deferred until the ensuing term (or day appointed) and the defendant admitted to bail upon similar terms and conditions.

Crown Office
Rules as to
postponement
of judgment.

By the Crown Office Rules, 1906, on all trials for felonies or misdemeanours in the King's Bench Division, except upon informations filed by leave of the court, and *ex officio* informations where the Attorney-General shall pray that the judgment may be postponed, judgment may be pronounced during the sittings or assizes at which the trial has taken place, by the judge before whom the verdict has been taken; as well upon the defendant who shall have suffered judgment by default, or confession, as upon those who shall have been tried and convicted, and whether such persons be present or not in court (b).

(a) *R. v. Waddington*, 1 East, 143.

(b) C. O. R. 1906, r. 162.

The judge before whom the trial shall be had may either issue an immediate order or warrant, for committing the defendant in execution, or respite the execution of the judgment on such terms as he shall think fit, and for such time as may be necessary, for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment, and if imprisonment be part of the sentence, may order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison (c).

If a defendant be convicted and not sentenced at the trial, and is not under recognizance or under sufficient recognizance to appear to receive the sentence of the court, or if it be made to appear on affidavit or otherwise that he is likely to abscond, a judge's warrant may be obtained at any time after verdict and before final judgment; and either from the judge at the trial or from a judge at Chambers, to hold him to bail, or to require him to give such further bail as the judge in his discretion may think fit; upon a certificate, if he be not under recognizance, of the conviction to be obtained from the clerk of assize or associate or other proper officer; and a certificate of his not being under recognizance from the Crown Office, or if he be under recognizance, upon a certificate of conviction and an affidavit of facts showing the necessity of further bail (d).

Judge's
warrant to
hold to bail.

After a verdict of guilty against the defendant, on the trial of an indictment or a criminal information for libel, he may move the court in arrest of judgment, on the ground of there being a substantial defect on the record: that there is in law no libel, or no sufficient averment of it in the indictment or information. And therefore, although the jury should find that the matter charged is a libel, if the court should afterwards be of opinion that it is not, judgment will be arrested whether on an indictment in a criminal case or a record in a civil suit (e).

Motion in
Arrest of
Judgment.

Whenever a verdict has passed against a defendant in a case of libel, and judgment has been given in the court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the court below have gone wrong: but they are not called upon to say that the words were incapable of conveying the libellous imputation;

(c) C. O. R. 1906, r. 163.

(d) *Ibid.*, r. 164.

(e) *Vide* The Libel Act, 1792; and *Hearne v. Stowell*, 12 A. & E. 731; *Goldstein v. Foss*, 4 Bing. 489; *The Capital and Counties Bank v. Henty*, 7 App. Cas. 741; 52 L. J. Q. B. D. 232; and *supra*, p. 317.

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One Count
bad, no Ground
for arresting
judgment.

Time for
moving in
Arrest.

Writ of Error,
proceedings
as to.

Respite of
Judgment
pending appli-
cation for Writ
of Error.

Error not
available,
when.

it is enough if they can make out, to the satisfaction of the court in error, that the onus of showing that they do convey such an imputation is not satisfied (*f*).

The vice of one or more counts is no ground for arresting the judgment (*g*), provided there be one valid count in the information or indictment; though as already seen (*h*), it is otherwise in a civil action, where general damages are given; since in the latter case the court cannot apportion the damages, and say how much was intended to be given in respect of the defective counts.

A motion in arrest of judgment should, in strictness, be made before sentence is passed, though upon leave reserved it may be moved after sentence (*i*). The defendant must be present in court at the time the motion is made (*k*). But in the case of a *special* verdict by the jury, the presumption of innocence may be supposed to continue; and, therefore, it is said, the personal presence of the defendant may be dispensed with (*l*).

The defendant may likewise, in libel, as in other criminal cases, bring his writ of error for any substantial defect appearing upon the record after conviction and sentence, on obtaining the fiat of the Attorney-General for the time being for that purpose (*m*).

The court on giving final judgment, or the Court of Appeal on affirmance may, if they shall so think fit, on the application of the defendant then present, respite the execution of the judgment for such time as may be necessary for the defendant to obtain the Attorney-General's fiat for a writ of error, or consent for an appeal to the House of Lords, upon the defendant entering into recognizance with two sufficient sureties, upon such terms as the court may order, to render himself into custody or to prosecute his writ of error or appeal with effect; and may order the period of imprisonment, if that be part of the sentence, to commence on the day on which the party shall be actually taken to and confined in prison (*n*).

After conviction for publishing a defamatory libel, the defendant cannot raise, on a writ of error, the objection that the

(*f*) See per Lord Blackburn, 7 App. Cas. 776; 52 L. J. Q. B. D. 251.

(*g*) *R. v. Benfield and another*, Burr. 980.

(*h*) *Supra*, p. 348.

(*i*) See 2 Den. C. C. 372 (note).

(*k*) See *Rex v. Spragg and another*,

2 Burr. 929.

(*l*) See *Rex v. De Berenger and others*, 3 M. & S. 67; and see per Lord Campbell, C.J.; 2 Den. C. C. 372.

(*m*) *Vide* C. O. R. 1906, rr. 173 to 205.

(*n*) C. O. R. 1906, r. 169.

provisions of the Vexatious Indictments Act as to entering into recognizances to prosecute, &c., had not been complied with. It being then too late to take the objection (*o*).

The court will not grant a *habeas corpus* to discharge out of custody a person who has been convicted of publishing a seditious libel, at the commission of *Oyer and Terminer* at the Old Bailey, on the ground that when the verdict was returned only one commissioner was present instead of two, as required by law (*p*).

Applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment, where such applications may by law be made, must be by motion for an *order nisi*. Such motion must be made to a Divisional Court of the King's Bench Division, and in cases tried in London or Middlesex, within eight days after the trial, or on the first subsequent day on which a Divisional Court shall sit to hear motions on the Crown side; or if the trial has been had at the assizes, within the first seven days after the last day of the sittings on the circuits for England and Wales: the time of the vacations not being reckoned in the computation of time for moving (*q*).

Crown Office
Rules as to
Motions for
New Trials,
&c.

The time in either case may be extended by the court or a judge. The grounds upon which the order was granted must be stated in the order (*r*).

A copy of such order must be served on the opposite party within four days from the time of the same being granted (*s*).

On moving for a new trial on indictment, information, or inquisition, all the defendants, if more than one, who are not either in custody or who are only liable to a fine must be present in court, unless the court shall otherwise order (*t*).

Defendants
must be
present in
Court.

It is usual to postpone the argument upon the rule until the defendant is brought up for judgment (*u*), as in all criminal cases the proceedings should be conducted in the presence of the accused. But the rule does not apply, in strictness, where the offence of which the defendant has been convicted is punishable by a fine only (*x*).

Where a plea of justification under the statute (*y*) contained

Justification
partly proved

(*o*) *Boaler v. The Queen*, 21 Q. B. D. 284; 57 L. J. M. C. 85; 16 Cox, C. C. 488.

(*p*) *Re x v. Richard Curtille*, 4 C. & P. 415, 422.

(*q*) C. O. R. 1906, r. 156.

(*r*) *Ibid.*, r. 157.

(*s*) *Ibid.*, r. 158.

(*t*) *Ibid.*, r. 159.

(*u*) *Reg. v. Hetherington*, 5 Jur. 529.

(*x*) *R. v. Parkinson*, 2 Den. C. C. 459.

(*y*) 6 & 7 Vict. cap. 96, s. 6.

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- several charges, and the jury found one of them proved, but as to the others that the evidence was not satisfactory: even if the court should be of opinion that as to any one or all of the charges, the evidence greatly preponderated against the prosecution, still the court will not set the verdict aside, and grant a new trial (z).
- Rejection of Evidence.** Where, upon a trial for libel upon a criminal information, evidence is tendered for one purpose and rejected as inadmissible for that purpose, but is admissible in another view of the case not alluded to at the trial; the court will not grant a new trial upon the ground that the evidence was improperly rejected (a).
- Misdirection.** But the court will grant a new trial of a criminal information for libel, if it be shown that the judge misdirected the jury in point of law (b).
- Proceedings on defendant coming up for judgment.** When the defendant is brought up for judgment, affidavits may be produced by the prosecutor in aggravation of punishment, and by the defendant in mitigation. These are read aloud to the court by the master; after which observations concerning their contents are made by counsel in behalf of their respective clients. Affidavits on the part of the prosecutor may be read in aggravation, though made by witnesses who were examined at the trial; in which case, however, the defendant will be at liberty to answer them (c).
- Affidavits as to subsequent conduct of defendant.** To show the malice of the defendant, the prosecutor may state upon his affidavit similar libels published since the conviction. It being well settled that the conduct of the defendant, subsequent to his conviction, may be taken into consideration either by way of aggravating or mitigating the punishment; but the court will take care not to inflict a greater punishment than the principal offence will warrant (d).
- Conduct prior to conviction.** So also affidavits of prior libels by the defendant, and office copies of any prior convictions of the defendant for libels published by him of the prosecutor, are admissible in aggravation of punishment.
- Affidavits on judgment by default.** If the defendant suffered judgment by *retraxit*, it is unnecessary that the record should contain a confession of the indictment (e).

(z) *R. v. Newman*, 1 E. & B. 577.
 (a) *Rex v. Grant and others*, 3 Nev. & Man. 106; 5 B. & Adol. 1081.

(b) *The Quern v. Holbrook and others*, 3 Q. B. D. 60; 47 L. J. 35; 4 Q. B. D. 42; 48 L. J. 113.

(c) *R. v. Sharpness*, 1 T. R. 228; *R. v. Pinkerton*, 2 East, 357.

(d) *R. v. Withers*, 3 T. R. 432.

(e) *Gregory v. The Queen*, 15 Q. B. 973.

Where the defendant has pleaded guilty to an indictment for publishing a libel, and entered into his own recognizance to appear and receive judgment when called upon to do so, and not to be called upon at all if he discontinue to publish libels on the prosecutor; should the defendant afterwards publish such libels, the court will require an affidavit to that effect before passing judgment upon him (*f*).

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On Breach of
Recognizance.

It is not usual to give the defendant an opportunity of answering at a future day the affidavits produced by the prosecutor, where they do not extend beyond the allegations contained in the indictment, though judgment should have been suffered by default (*g*). But where affidavits are produced to show a *continuation* of the defendant's malice, the court has thought it reasonable to allow the defendant an opportunity of answering them, since it cannot be supposed that he comes prepared to answer that which is not contained in the indictment (*h*).

As to answer-
ing Prosecu-
tor's Affidavits.

The defendant is, in general, at liberty to introduce any affidavit tending to show that his act did not result from malice, but proceeded from some motive less reprehensible. How far he should proceed in such statements is, of course, a matter of prudence and discretion to be exercised upon the particular circumstances of the case. Any reflections upon the prosecutor beyond those conveyed by a bare statement of facts, and any attempt to impugn the credit of the witnesses, or the justice of the conviction, are inconsistent with the situation of the defendant, who stands before the court as a suppliant for its indulgence, and not in the character of an accuser.

What may be
shown in Miti-
gation of
Punishment.

A defendant is not at liberty to show, by affidavit, in mitigation, that a libel, imputing a criminal charge, was true, whether the party reflected on be or be not the prosecutor (*i*). In the case of *The King v. Burdett* (*k*), where the libel imputed that certain of the King's troops had maimed certain of the King's subjects; it was held not competent for the defendant to use affidavits, after conviction, in mitigation of punishment for the purpose of showing that the facts stated were true. But the libel purporting to have been written in consequence of the

Truth of Libel
not available
in Mitigation
unless pleaded.

(*f*) *Reg. v. Richardson and others*,
8 Dowd. 511.

(*g*) *R. v. Wilson*, 4 T. R. 487.

(*h*) *Ibid.*; and *R. v. Archer*, 2
T. R. 203, n.

(*i*) *R. v. Halpin*, 9 B. & C. 65; *R.*
v. Bradley, 2 M. & R. 152; *R. v.*
Roberts, Mich. T. 8 G. 2; Digest Law
of Libels, 16.

(*k*) 4 B. & Ald. 314.

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Mitigation
under s. 6 of
the Libel Act,
1843.

defendant having read statements to that effect in different newspapers, an affidavit that he had read those statements in the newspapers and that he had no doubt in his own mind that the statements were true, was allowed to be read.

If the defendant has pleaded a justification under section 6 of the Libel Act, 1843, he may, in mitigation of punishment, show by affidavit that after the publication, but before plea pleaded, information was given to him which, if true, would have supported an allegation in the plea; evidence having been given at the trial to account for the non-production of proof, but no evidence in support of the allegation itself. But where a document which would have supported the plea has been rejected at the trial for want of authentication as to the place of custody or otherwise, its contents are not admissible in confirmation of the defendant's own affidavit that such a document was communicated to him before plea pleaded (*l*). The opinion expressed by the jury on any particular parts of a plea of justification (the whole not being proved) cannot be entered on the record. It might be reported by the judge who presided at the trial, to the court by whom the sentence is to be pronounced; but the judges, in deliberating upon the sentence, are bound to form their own opinion upon the evidence; and as they think that it aggravates or mitigates the guilt of the defendant, they are to apportion the punishment accordingly (*m*).

Mitigation
under s. 7.

Where, in the case of a libel published in a newspaper, the jury find that although the libel was published without the defendant's knowledge, yet that he did not use due care or caution to prevent its publication, the conviction will be sustained; but the court will take the finding of the jury into consideration in mitigation of punishment (*n*).

That defendant
stopped the
sale of the
libel.

It may be shown in mitigation of punishment, where the libel was published in a newspaper, book, or pamphlet, that the defendant stopped the sale and circulation of the libellous publication, immediately on complaint; or on becoming aware of its libellous tendency, if previously unaware thereof.

That he is
liable to the
costs of the
prosecution.

In awarding judgment against a defendant after conviction, on an indictment removed at the defendant's instigation into the King's Bench Division, the court will take into account

(*l*) *R. v. Newman*, 1 E. & B. 558.

(*m*) *Ibid.*, 578, per Lord Campbell,
C.J.

(*n*) *The Queen v. Wyman*, Sitt.
Banc., June, 1879, cor. Cockburn,
L.C.J., and Lush and Manisty, JJ.

the fact that the defendant has entered into recognizances by which he is liable to pay the costs of the prosecution (o).

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General evidence of good character is always proper to be introduced into affidavits in mitigation.

With respect to the order observed in reading the affidavits: Order of
—When any defendant shall, after verdict, be brought up for reading the
sentence on any indictment or information, after the notes of Affidavits on
the trial shall have been read, the affidavits produced on the defendant
part of the defendant, if any, shall be read; and then any being brought
affidavits produced on the part of the prosecution; after which up for sentence.
the counsel for the defendant shall be heard, and lastly, the
counsel for the prosecution (p).

When any defendant shall be brought up for sentence after judgment by default, confession, or *retraxit*, the prosecutor's affidavits shall be first read, then the defendant's affidavits, after which the counsel for the prosecution shall be heard, and lastly the counsel for the defendant (q).

If no affidavits are produced, the counsel for the defendant shall be first heard, and then the counsel for the prosecutor (r).

As a misdemeanour at common law, the offence of libel is punishable by fine and imprisonment, at the discretion of the court, after full consideration of all the circumstances, including the nature and tendency of the libel, and the manner and extent of publication, as tending either to extenuate or aggravate the guilt of the offender. Punishment on Conviction.

A person duly convicted of a misdemeanour at common law,—as by publishing a libel,—may, in addition to the punishment of fine and imprisonment for such offence, be also adjudged to give security for his good behaviour, for a reasonable time, to be computed from and after the expiration of such imprisonment; himself in a sum named in such judgment, with two sufficient sureties, each in a sum therein also mentioned (s). Sureties for good behaviour.
And he may be also adjudged to be further imprisoned until such security be given (t). And it has been held in a case in Ireland, that the Court of King's Bench, as Conservators of the Peace, have original jurisdiction, independently of the

(o) *The Queen v. Wyman*, *supra*.

(p) C. O. R. 1906, r. 170.

(q) C. O. R. 1906, r. 171.

(r) *Ibid.*, r. 172.

(s) Per unanimous opinion of the judges on question submitted to them, see *Lords' Journals*, Vol. 47, p. 271; *Rez v. Middleton*, Fort. 201; *Rez v.*

Hart and another, 30 How. St. Tr. 1131, 1194, 1344; and see *Rez v. Wilkes*, 4 Burr. 2574; *R. v. Abingdon*, 1 Esp. 229.

(t) *Ibid.*; and see *Dunn v. The Queen*, 12 Q. B. 1026, 1041; *The King v. Hunt*, St. Tr. 2 N. S. 104.

CHAPTER
XXXVII.Where two or
more informa-
tions.Judgment
where several
Counts.

statute, 34 Ed. III. c. 1, to require sureties for good behaviour from persons whose acts or language are shown to be likely to endanger the public peace (*u*).

Where the defendant is convicted upon two or more informations, a separate judgment of fine and imprisonment may be given upon each; that on the second to commence at the expiration of that on the first (*x*).

If the indictment or information on which the defendant is found guilty, contains several counts, a separate punishment should be awarded upon each count. For if judgment be entered generally on the record, that "for the offences charged in each and every count, the defendant be imprisoned for six months now next ensuing"; such being, in form, a sentence of one term of imprisonment upon the whole indictment, it will be erroneous if any one count should afterwards be held bad. But where judgment was entered, on each of four counts of an information for libel, that the defendant be imprisoned, on the first count, "for the space of two months now next ensuing"; on the second count, "for the further space of two months, to be computed from and after the end and expiration of his imprisonment for the offence mentioned in the first count"; on the third count, "for the further space of two months, to be computed, in like manner, from the end of the imprisonment on the second count"; and on the fourth count, "for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count": and the third count of the information was afterwards held bad by a court of error; it was held, that the sentences on the preceding and subsequent counts were not thereby invalidated (*y*).

When a defendant is brought up to receive sentence after conviction for libel, on the trial of a criminal information, or an indictment removed into the Court of King's Bench, the sentence of the court is not pronounced by the President (the Chief Justice) but by the judge next in seniority: and this has always been the practice (*z*).

Punishment
under the
Libel Act,
1843.

As to the punishment for libel under the Libel Act, 1843 (*a*); where the defendant is convicted of publishing, or

(*u*) *Seymour v. Davitt, Same v. Quinn*, L. R. (1r.) 12 Q. B. D. 46.

(*x*) See *Rex v. Wilkes*, 4 Burr. 2574, 2577.

(*y*) *Gregory v. The Queen*, 15 Q. B. 974.

(*z*) See *Rex v. Wilkes*, 4 Burr. 2574; *Rex v. Waddington*, 1 East, 160; *Rex v. Wakefield* (Clk.), 27 How. St. Tr. 754.

(*a*) 6 & 7 Vict. c. 96, s. 3.

threatening to publish, any libel, or of threatening to print or publish, or to abstain from so doing, with intent to extort money, &c., he may be imprisoned with or without hard labour for any term not exceeding three years.

By section 4, any person convicted of publishing any defamatory libel, knowing the same to be false, may be imprisoned for any term not exceeding two years, and ordered to pay such fine as the court shall award.

By section 5, any person convicted of publishing any defamatory libel shall be liable to fine or imprisonment, or both, as the court may award, the imprisonment not to exceed one year.

By section 6, where a special plea is pleaded as therein mentioned, if the defendant shall be convicted, the court, in pronouncing sentence may consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or disprove the same (*b*).

A sentence passed on a defendant for a malicious libel, may be amended if there be error or mistake in the *retraxit*, or in the form or mode of punishment; but a judge at chambers has no jurisdiction to order the amendment, it must be made on application to the full court (*c*): which will, in the case of an indictment or a criminal information for libel, allow the record to be amended as to the sentence, where a term of imprisonment has been erroneously entered, generally, on several counts: and this even after the case is entered for argument: but only on payment of costs by the prosecutor: and so also, even after argument in a court of error, before judgment; but also only on payment of costs by the prosecutor (*d*).

Amendment of
Sentence, and
Record.

By the Libel Act, 1843, s. 8, in the case of any indictment, or information (*e*), by a *private prosecutor* for the publication of any defamatory libel, if judgment be given for the defendant he will be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information. And upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he will be entitled to recover from the defendant, the costs sustained by the prosecutor by reason of such plea; such costs so to be recovered by the defendant or prosecutor

Costs on
Indictment
for Libel.

(*b*) *Vide supra*, p. 526.

(*d*) *Gregory v. The Queen*, 15 Q. B. 957.

(*c*) *Gregory v. The Queen*, 15 Q. B. 970; see also *O'Connell v. The Queen*, 11 Cl. & Fin. 155.

(*e*) See as to Costs on Criminal Information, *supra*, p. 459 *et seq.*

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respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried.

The section applies exclusively to indictments and informations by a "private prosecutor," and not to prosecutions instituted by the Attorney-General, nor to seditious libels (f) : nor to obscene or blasphemous libels.

It also appears, that if there be no special plea of justification, then, although the defendant be found *Guilty*, or plead *Guilty*, there is no power to compel him to pay any of the costs of the prosecution. The prosecutor is entitled to recover of the defendant, only the costs sustained by reason of the special plea of justification : which do not include the general costs of the prosecution.

No Costs if
Bill ignored.

And if on an indictment for libel, the bill is ignored by the grand jury, no "judgment" is given ; consequently it would appear that no costs can be recovered on either side, under the above section.

Defendant's
costs on
acquittal.

If on the trial of an indictment, or a criminal information, for libel, the defendant be found *Not Guilty*, judgment of acquittal is given and he is then entitled, under the above section, to recover of the prosecutor all the costs he has sustained by reason of such indictment or information ; which include those of showing cause against a rule *nisi* for the filing of a criminal information (g). And no appeal lies against an order of the King's Bench Division, upholding the master's allowance of such costs on taxation under the above section (h).

The costs may
be recovered by
action at law.

The costs, under this section, may be recovered in an action at law by a defendant who has been found *Not Guilty*. A judge of Oyer and Terminer has no power to issue execution for them. A certified copy of the record of such acquittal is admissible as evidence of the record (i). The issue of *nul tiel record* is tried by the court and not by a jury (k).

No Certificate
of Judge can
deprive Defen-
dant of costs.

If judgment be given for the defendant he is entitled to costs under the 8th section, although the only plea on the record is

(f) See *The Queen v. Duffy*, 9 Ir. L. R. 329 ; 2 Cox, C. C. 49.

(g) *The Queen v. Steel and others*, 1 Q. B. D. 482 ; 45 L. J. 391. There is a decision of the Court of Q. B. in Ireland to the contrary, which, however, was not followed in the above case. See note (t), *supra*, p. 461.

(h) *Ibid.*, 2 Q. B. D. 27 ; 46 L. J. M. C. 1. It would seem, from the 8th section above mentioned, that in the

event of a new trial being obtained, if judgment of acquittal be given, the defendant would be entitled to his costs of both trials. This point has not however been decided, as no case has yet arisen in which it has been raised.

(i) 14 & 15 Vict. c. 99, s. 13.

(k) *Richardson v. Willis*, 42 L. J. Ex. 15 and 68 ; L. R. 8 Ex. 69.

that of *Not Guilty*, and though he has not pleaded a special plea under the 6th section: and the judge has no power to deprive him of such costs (*l*).

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The Court of King's Bench has no jurisdiction to direct the clerk of assize to review his taxation of costs (under the 6 & 7 Vict. cap. 96, s. 8) of an indictment for libel tried on the Crown side under a commission of oyer and terminer. It appears, however, that one of the judges appointed by such commission, has jurisdiction to do so if application be made before that commission be superseded (*m*).

Where, on an indictment for conspiracy, with a count for libel, the indictment was removed by *certiorari* into the Court of King's Bench, and at the trial the prosecutor abandoned the counts for conspiracy, and the defendant was found guilty as to the libel: on taxation of costs, under 5 W. & M. cap. 11, s. 3, the master having allowed the prosecutor the costs of the counts for the conspiracy as well as for the libel, it was held, that the costs could only be claimed on the count for libel (*n*).

Costs on
Indictment for
conspiracy,
with count for
libel.

But where a public body preferred an indictment for a libel upon one of its officers in the name of such officer, and the defendant afterwards removed the indictment by *certiorari*, and was convicted; it was held, that no costs could be awarded under the 5 W. & M. cap. 11, s. 3, as the party libelled was not the "party grieved" within the meaning of that statute (*o*).

Costs where
prosecution by
a public body.

A municipal corporation have no power to order the expenses of a prosecution for libel, incurred with their sanction, by one of their officers, to be paid out of the borough fund (*p*).

Costs of prosecuting a Libel
not payable out
of Borough
fund.

The costs of a prosecution for libel affecting the private characters of the directors of a trading company, and only incidentally affecting the company itself, are not properly payable out of the assets of the company: and a court of equity granted an injunction restraining the application of the funds of the company to such a purpose (*q*). But where the libel directly affects the company itself, and the costs of a prosecution for the libel have been paid out of the assets of the company, the court will not interfere by injunction (*r*).

Costs of prosecuting a Libel
on a company,
when payable
out of the
Company's
assets.

(*l*) *R. v. Latimer*, 15 Q. B. 1077.

v. same, 26 L. T. (N. S.) 101.

(*m*) *Reg. v. Newhouse*, 1 L. & M. 129. See *Reg. v. Steel*, *supra*.

(*q*) *Pickering v. Stephenson*, 41 L. J. Ch. 493.

(*n*) *R. v. Hawdon*, 3 Per. & Dav. 44.

(*r*) *Studdert v. Grosvenor*, 33 Ch. D. 528; 55 L. J. 689; and see *Brcay v. Royal Brit. Nurses' Assoc.*, C. A., (1897)

(*o*) *R. v. Dewhurst*, 2 Nev. & Man. 253; 5 B. & Adol. 405.

(*p*) *R. v. Mayor and others of Liverpool*, 41 L. J. Q. B. 175; *Wilmer*

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of the plaintiff the words following (that is to say), "Have you heard about A—— B——? It is said that he stole Grimsby's mare last week, and sold her at Croydon fair to a horse-dealer for £20; the mare was worth over £50." The defendant meaning thereby that the plaintiff had feloniously stolen a mare, the property of one George Grimsby.

The plaintiff claims ——.

Damages £——.

(Signed) (d).

Place of trial —— (e).

Delivered the —— day of ——, 19——.

By ——

of, &c.,

Solicitor for the Plaintiff

NO. 4. FORM OF DEFENCE TO ACTION OF SLANDER.

19—. B. No. —.

In the High Court of Justice,

King's Bench Division,

Between A—— B——,

Plaintiff,

and

C—— D——,

Defendant.

Defence.

The defendant says:—

1. That he denies the speaking and publishing of the words alleged.

2. That the words (if spoken by the defendant) were spoken on a privileged occasion (f) without malice and in the *bonâ fide* belief that they were true.

3. The defendant does not admit that the words alleged (if spoken by the defendant) were intended to convey or

as a *fact*, without setting out the circumstances from which the same is to be inferred. *Vide* R. S. C., Ord. XIX., r. 22.

(d) Signature of counsel is not necessary; but where pleadings have been settled by counsel, or a special pleader, they must be signed by him; and if not so settled, they must be signed by the solicitor, or by the party if he sues or defends in person. R. S. C., Ord. XIX., r. 4.

(e) There is now no local venue for the trial of any action, except where otherwise provided by statute, but in every action in every Division the place of trial will be fixed by the Court or a Judge. Ord. XXXVI., r. 1 (R. S. C., July, 1902).

(f) The defendant may be required to give particulars of the occasion and circumstances relied on as constituting privilege.

that they did convey the meaning alleged in the plaintiff's innuendo.

(Signed)
Delivered the — day of —, 19—.
By — of, &c.,
Solicitor for the Defendant.

NO. 5. STATEMENT OF CLAIM IN AN ACTION OF SLANDER OF THE PLAINTIFF IN HIS TRADE.

[Heading as in Form No. 3.]

1. The plaintiff, at the time of the publication of the defamatory matter hereinafter mentioned, was a baker, carrying on his trade and business as such at —, in the county of —.

2. The defendant falsely and maliciously spoke and published of the plaintiff, and of him as such baker so carrying on his trade and business as aforesaid, the words following (that is to say) "He (meaning the plaintiff) will soon have to shut up his shop. His affairs are in liquidation. His millers have refused to supply him with any more flour. They have stopped his credit. He has no flour to bake with." [The defendant meaning thereby that the plaintiff was insolvent and unable to carry on his business, and that the millers would not trust him with flour on credit (g).]

The plaintiff claims —.

Damages £—.

Place of trial — (h).

(Signed)

Delivered the — day of —, 19—.

NO. 6. STATEMENT OF CLAIM IN AN ACTION OF SLANDER OF CO-PARTNERS IN TRADE; WITH ALLEGATIONS OF SPECIAL DAMAGE.

[Commence as in Form No. 3.]

Between A— B—, C— D—, and E— F— } Plaintiffs,
(trading as A. B. & Co.)

and

G— H—, Defendant.

Statement of Claim.

1. The plaintiffs are co-partners carrying on the trade and

(g) This innuendo is, however, unnecessary, the defamatory words above set forth being actionable without the aid of an innuendo, the meaning being clear upon the face of them.

(h) See note (e), *supra*, p. 537.

business of cattle-salesmen at —, and at the cattle-markets held at — and other places.

2. The defendant is a farmer and cattle-dealer carrying on his business as such at — and elsewhere.

3. The plaintiffs in the course of their said trade and business attended the cattle-market at — aforesaid and took and exposed for sale thereat 79 head of cattle, consisting of bullocks and heifers.

4. The defendant falsely and maliciously spoke and published of the plaintiffs and of them in their said trade and business, and of their said cattle so exposed for sale at the said market, the words following (that is to say) “ These cattle (meaning the plaintiffs’ said cattle) ought not to be allowed in the market; they are diseased; they have the foot-and-mouth disease.”

5. Also the words “ These cattle (meaning the plaintiffs’ said cattle) are diseased. Here is one foaming at the mouth. The foot-and-mouth disease is about, and these cattle have got it.”

6. Also the words “ These cattle belong to the man (meaning one of the aforesaid plaintiffs) that you and your master bought the 20 cattle of. They have got the disease.”

7. The defendant meaning thereby and by the several slanderous words and statements aforesaid, that the plaintiffs’ said cattle were affected with a contagious and infectious disease, and that the plaintiffs knowingly exposed for sale in the cattle-market at — aforesaid, cattle affected with a contagious and infectious disease, and that the plaintiffs were thereby also guilty of various offences under the Contagious Diseases (Animals) Act, 18—.

8. By reason of the several slanderous words aforesaid the plaintiffs’ said cattle became and were unsaleable at the said market, and the plaintiffs lost the sale thereof and incurred expenses for the driving, housing, and conveyance of the said cattle and for food and fodder for the same, and the plaintiffs were put to much trouble, loss of time, and expense in and about the said cattle, and in obtaining an examination thereof by a veterinary surgeon, and in procuring certificates from the said veterinary surgeon; and the plaintiffs were obliged to sell and did sell the said cattle at greatly reduced prices, and lost and were deprived of the profits they would otherwise have made on sale of the said cattle; and were otherwise greatly wronged and injured in their said trade and business, and in their credit and reputation.

[Conclude as in Form No. 3.]

No. 7. STATEMENT OF CLAIM IN AN ACTION FOR WORDS
IMPUTING IMMORALITY TO A BENEFICED CLERGYMAN; WITH
AVERMENTS AND INNUENDOS.

[Heading as in Form No. 3.]

1. The plaintiff, at the time of the speaking and publishing by the defendant of the words hereinafter mentioned, was in holy orders as a clergyman of the Church of England, and held the office of rector of B., which office is one of great trust and profit to the plaintiff, and is within the diocese of the Lord Bishop of L.

2. Whilst the plaintiff was such rector as aforesaid, he was accused of having been guilty of incontinence with a certain woman, and of being the father, or putative father, of a certain bastard child, and was summoned to appear before the magistrates at C—— to show cause why he should not contribute to the maintenance of the said child.

3. At the hearing of the said summons, the magistrates aforesaid adjudged that the plaintiff was *Not Guilty* of incontinence with the said woman, and was not the father, or putative father, of the said child, and dismissed the said summons, and the plaintiff was wholly exonerated and acquitted of the said charge, and no appeal has been had against the said decision and judgment of the magistrates aforesaid.

4. The defendant afterwards, in a conversation upon and about the matters and premises aforesaid, with divers persons to wit, D. E., F. G., and others, and in their presence and hearing, falsely and maliciously spoke and published of the plaintiff, in relation to his character as such clergyman as aforesaid, and in relation to his office of rector of B., the words following (that is to say), "If Mr. A. knows nothing against Mr. G." (meaning the plaintiff) "the Bishop" (meaning the Lord Bishop of L.) "does." And, in answer to a question by the said D. E. as to what the said Bishop knew against the plaintiff, the defendant falsely and maliciously spoke and published of the plaintiff as such clergyman and rector as aforesaid, the words following (that is to say), "Why, that gross affair in B——" (the defendant meaning thereby, that the conduct of the plaintiff, whilst such rector as aforesaid, in and with respect to the matters and premises aforesaid, had been of a gross and scandalous nature, and that the plaintiff

had been guilty of incontinence with the said woman, and was the father, or putative father, of the said bastard child) (i).

[Conclude as in Form No. 3.]

NO. 8. STATEMENT OF CLAIM IN AN ACTION OF SLANDER
IMPUTING IMMORALITY TO A DOMESTIC SERVANT.

[Heading as in Form No. 3.]

1. The plaintiff is a domestic servant, and at the time of the speaking and publishing of the defamatory matter hereinafter complained of, was about to enter the service as housemaid, of one Lady D——, at certain wages which had been agreed on.

2. The defendant falsely and maliciously spoke and published of the plaintiff, and of and concerning her as a domestic servant, the words following (that is to say), "She is a bad girl; when living in her last situation she used to admit men into the house at all hours of the night after her mistress was gone to bed." (The defendant meaning thereby that the plaintiff was unchaste, and had been guilty of gross misconduct, and of immorality with men, when in service as a domestic servant.)

3. By reason of the speaking and publishing of the words complained of, the said Lady D—— refused to receive the plaintiff into her service, and the plaintiff was and is otherwise injured in her character and reputation, and deprived of her wages and employment as a domestic servant (k).

The plaintiff claims £—— damages

Place of trial ——.

(Signed)

Delivered the —— day of ——, 19——.

By ——, of, &c.,

Solicitor for the Plaintiff.

NO. 9. STATEMENT OF CLAIM IN AN ACTION FOR SLANDER,
ACTIONABLE ONLY IN RESPECT OF THE SPECIAL DAMAGE
SUSTAINED.

[Heading as in Form No. 3.]

1. The defendant falsely and maliciously spoke and published of the plaintiff the words following (that is to say), "I

(i) See *Gallwey v. Marshall*, 23 L. J. Ex. 78.

(k) Verbal imputations of unchastity or adultery in females are now actionable without proof of special damage. 54 & 55 Vict. c. 51; and *supra*, p. 44.

am surprised at your associations with that fellow. He is one of the most unprincipled scoundrels in the county. None of the county families will receive him. There is some dark mystery hanging over that man's head, in connection with some offence he is said to have committed, that will some day be brought to light." (The defendant meaning thereby that the plaintiff had committed an offence for which he was amenable to the criminal law, and also that he had been guilty of fraudulent and unprincipled conduct, and was unfit for the society of gentlemen, or to be received into the society of county families.)

2. In consequence of the speaking and publishing of the slander complained of, the plaintiff lost the friendship, society, and hospitality of divers friends and county families in the county and neighbourhood of L—— and M——, and was otherwise damnified in his character and reputation.

The plaintiff claims—

Damages £ .

Place of trial —.

(Signed)

Delivered the — day of —, 19—.

No. 10. ANOTHER FORM.

[Heading as in Form No. 3.]

The plaintiff has suffered damage by the defendant having falsely and maliciously spoken and published of the plaintiff the words following (viz.)—

[*Here set out the defamatory matter with appropriate innuendoes, if necessary.*]

Particulars of special damage—

Loss of business, £ .

Loss of —, £ .

And the plaintiff claims, £ .

(Signed)

Place of trial —.

Delivered, &c.

Note.—This and the preceding Form are applicable to those cases in which the slander is actionable *only* in respect of the special damage sustained.

No. 11. DEFENCE TO ACTION OF SLANDER, RAISING OBJECTION
IN POINT OF LAW (*vide* R. S. C., ORD. XXV. R. 2,
"PROCEEDINGS IN LIEU OF DEMURRER").

3. As a point of law, the defendant will object that the words are not, in their natural and ordinary sense and meaning, defamatory of the plaintiff, and that no facts are alleged which show them to have been used in any defamatory sense, and therefore that the statement of claim is bad in law.

No. 12. DEFENCE TO ACTION OF SLANDER, RAISING GENERAL
QUESTION OF PRIVILEGE.

The words alleged, if spoken or published by the defendant, which he does not admit, were spoken and published *bonâ fide* and without malice, and on such an occasion and under such circumstances as constitute the same a privileged communication (*l*).

No. 13. DEFENCE [INCLUDING AN OBJECTION IN POINT OF LAW]
(ORD. XXV. R. 2, APP. E., SECT. III. No. 2).

To action for verbal slander, actionable only by reason of special damage.

[Heading as in Form No. 4.]

The defendant says:—

1. That he did not speak or publish the words.
2. The words did not refer to the plaintiff.
3. The defendant will object that the special damage stated is not sufficient in point of law to sustain the action.

(Signed)

Delivered the — day of —, 19—.

No. 14. FORM OF REPLY.

[Heading as in No. 4.]

Reply.

The plaintiff as to the defence says:—

1. That he joins issue thereon.

(Signed)

Delivered the — day of —, 19—.

(*l*) To a defence of this kind the defendant may be required to give particulars of the occasion and circumstances constituting the alleged privilege.

No. 15. STATEMENT OF CLAIM IN LIBEL (ORDINARY FORM).

[Heading as in Form No. 3.]

1. The defendant falsely and maliciously wrote and published [*or printed and published ; or caused and procured to be printed and published, or written and published*] of and concerning the plaintiff, the words and figures [*or the words and statements*] following (that is to say)—[*Here set out the alleged libel verbatim, with appropriate innuendoes where necessary.*] The defendant meaning thereby that the plaintiff, &c. [*according to the facts*].

The plaintiff claims—

Damages £——.

(Signed)

Delivered the —— day of ——, 19——.

No. 16. VARIOUS DEFENCES TO ACTIONS OF LIBEL (ORDINARY FORMS).

In the High Court of Justice,
King's Bench Division.

19——, B. No. —.

Between A—— B——,
and
C—— D——,

Plaintiff,

Defendant.

Defence.

The defendant says:—

1. That he denies the writing and publishing [*or the printing and publishing, as the case may be*] of the alleged libel.

or,

1. That he does not admit that he printed or published the defamatory matters alleged.

or,

1. That the defamatory matter complained of is true in substance and in fact.

or,

1. That the publication of the alleged libel was made by the defendant to his employers in the discharge of his duty to such employers, in the *bonâ fide* belief of the truth thereof, and without malice.

No. 17. REPLY IN ACTION OF LIBEL.

In the High Court of Justice, 19—, B., No. —.
King's Bench Division.

Between A—— B——, Plaintiff,
and
C—— D——, Defendant.

Reply.

The plaintiff, as to the defence, says—

1. That he joins issue thereon [*add where necessary*—except as to such parts thereof as contain admissions of facts in the statement of claim alleged].

2. To paragraph No. — of the defence, the plaintiff also says, that, &c. [*according to facts*].

(Signed)

Delivered the —— day of ——, 19—.

By ——, of, &c.
Solicitors for the Plaintiff.

No. 18. DEFENCES, TO ACTION OF LIBEL, CONTAINING CONCISE STATEMENTS OF FACTS SHOWING PRIVILEGE.

The words complained of were written without malice, and in the *bonâ fide* belief that they were true, and in reply to inquiries by one T. H. as to the character and fitness of the plaintiff for the office of manager of the business of the firm of T. H. & Co.

No. 19. or,

The publication of the defamatory matter alleged, was made by the defendant in his capacity of steward to the Hon. Mrs. N., on the occasion of an investigation of the accounts of the B. estate, by the trustees under her marriage settlement, and the publication by the defendant was made only to the said trustees, and was so made by letter to the said trustees, without malice, in the discharge of his duty as such steward, and in the *bonâ fide* belief that it was true.

NO. 20. STATEMENT OF CLAIM IN AN ACTION FOR LIBEL OF
AN INNKEEPER.

[Heading as in Form No. 3.]

1. The plaintiff before and at the time of the publication of the defamatory matter hereinafter mentioned carried on the business of an innkeeper, and was then, and had been for many years previously, the owner and occupier of the — hotel at —, in the county of —.

2. The defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him as such innkeeper, and of and concerning the said — hotel, and the plaintiff's conduct, management, and carrying on thereof, the words and statements following (that is to say) — [*Here set out the libel verbatim.*]

The defendant meaning thereby, that, &c. [*according to facts*].

[Conclude as in Form No. 3.]

NO. 21. STATEMENT OF CLAIM IN AN ACTION FOR A LIBEL ON
A CANDIDATE FOR PARLIAMENT.

[Heading as in Form No. 3.]

1. The plaintiff at the time of the publication of the defamatory matters herein alleged, was a candidate for the representation in Parliament of the electors of the — division of the county of —.

2. The defendant falsely and maliciously printed and published, and caused and procured to be printed and published of and concerning the plaintiff, and of and concerning him as such candidate as aforesaid, divers placards, posters, and handbills, containing the words and figures following (that is to say) — [*Here set out the libel verbatim.*]

The defendant meaning thereby that the plaintiff, &c. [*according to the facts*].

[Conclude as in Form No. 3.]

No. 22. DEFENCE TO ACTION FOR LIBEL ON A CANDIDATE
FOR PARLIAMENT.

[Heading as in Form No. 4.]

Defence.

The defendant says that—

1. At the time of the publication of the matters complained of, he also was a candidate for the representation in Parliament of the electors of the — division of the county of —.

2. The publications complained of were made by the defendant as such candidate as aforesaid to the electors of the said division in the *bonâ fide* discharge of his duty as such candidate, and were material to the issue then before the electors (*viz.*), the choice of a representative in Parliament for the said division, and the qualifications of the plaintiff as such candidate, and were privileged.

3. The publications complained of were made by the defendant *bonâ fide* and without malice, on the occasion of his and the plaintiff's candidature for a seat in Parliament as representative of the said division and in the interests of the constituents, and were privileged as such.

4. The publications complained of were made to the constituents of the said division and related to the plaintiff as a public man, and to a matter of public concern (*viz.*), the qualifications and fitness of the plaintiff for the representation in Parliament of the said division and not otherwise, and were privileged as such.

5. The matters complained of were of public concern and were published *bonâ fide* to the constituents of the said division, in the interests of the said constituency, for the benefit of the public, and without any sinister or malicious motive.

6. The words complained of were and are true in substance and in fact.

No. 23. STATEMENT OF CLAIM IN AN ACTION FOR LIBEL IN
A NEWSPAPER.

[Heading as in Form No. 3.]

1. The plaintiff is chairman of the Board of Directors of a Trading Company called the "B. C. Company (Limited)," which said company carry on their business at D—— Street, London.

2. The defendant is the printer and publisher of a newspaper called the E. F.

3. A meeting of the Directors of the said Company was held on the — day of —, 19—, at D— Street aforesaid, at which meeting the plaintiff was present in his capacity of chairman aforesaid.

4. The defendant afterwards falsely and maliciously printed and published of the plaintiff as such chairman as aforesaid, and of and concerning his conduct at the said meeting, in the said newspaper, and in the print thereof bearing date the — day of —, 19—, the words, statements, and figures following (that is to say). [*Here set out the libel verbatim, with appropriate innuendoes, if necessary.*]

The plaintiff claims £— damages.

(Signed)

Delivered the — day of —, 19—.

By —, of, &c.

Solicitors for the Plaintiff.

**NO. 24. DEFENCE TO ACTION OF LIBEL IN A NEWSPAPER ;
WITH JUSTIFICATION, UNDER "THE LAW OF LIBEL AMEND-
MENT ACT, 1888," 51 & 52 VICT. C. 64, s. 4.**

[Title as in Form No. 4.]

Defence.

1. The defendant does not admit that he printed and published the alleged libel, nor that he is the printer and publisher of the newspaper called the E. F., nor of the print thereof, bearing date the — day of —, 19—.

2. The defendant says that at a public meeting of the said "B. C. Company (Limited)," held at D — Street, on the — day of —, 19—, the plaintiff, [*Here set out facts of justification.*]

3. The defendant also says that the matters above stated did take place at the said meeting, and the plaintiff did, &c., [*according to the facts,*] and was, &c. [*according to the facts.*]

4. And the defendant also says that the words, statements, and figures alleged, formed part of a fair and accurate report published in the said newspaper, of the proceedings at the said meeting, and were of public concern, and the publication

thereof in the said newspaper was for the benefit of the public.

5. And the defendant (without admitting the publication thereof) further says, that the report was not published or made maliciously.

[Conclude as in Form No. 4.]

NO. 25. ANOTHER FORM OF DEFENCE TO LIBEL IN A NEWSPAPER, THAT FAIR AND ACCURATE REPORT OF PROCEEDINGS AT A PUBLIC MEETING.

[Heading as in Form No. 4.]

Defence.

1. The defendants as to paragraph No. — of the statement of claim admit that the words therein set forth were printed and published by them in the newspaper called “The——.”

2. The said words were and are a fair and accurate report of the proceedings of a public meeting, and the said report was not published or made maliciously, and the matters contained in the said report were of public concern, and the publication thereof was for the public benefit (*m*).

3. The defendants do not admit that the words complained of will bear the meaning alleged by the innuendo in paragraph No. — of the plaintiff’s statement of claim.

(Signed)

Delivered this —— day of ——, 19——.

NO. 26. FORM OF REPLY TO STATUTORY DEFENCE.

[Heading as in Form No. 17.]

Reply.

The plaintiff as to paragraphs Nos. 2 and 3 of the defence, says—

1. That he joins issue.

The plaintiff, as to the said paragraph No. 2, further says, that the defendant, on request made to him by the plaintiff, refused to insert in the said newspaper in which the report

(*m*) *Vide* 51 & 52 Vict. c. 64, s. 4.

complained of appeared, a letter containing a denial of the truth of the matters complained of as having been published in the said newspaper.

(Signed)

[Conclude as in Form No. 17.]

NO. 27. STATEMENT OF CLAIM IN AN ACTION FOR LIBEL CONTAINED IN A REPORT OF JUDICIAL PROCEEDINGS PUBLISHED IN A NEWSPAPER.

[Heading, &c., as in Form No. 3.]

Statement of Claim.

1. The defendants falsely and maliciously printed and published, and caused and procured to be printed and published, of and concerning the plaintiff, in a newspaper called "The —," the words following (that is to say)—

[Here set out the libellous matter complained of, with such innuendoes as may be necessary.]

The plaintiff claims damages £—.

An Injunction (n).

(Signed)

[Conclude as in Form No. 3.]

NO. 28. STATUTORY DEFENCE, UNDER "THE LAW OF LIBEL AMENDMENT ACT, 1888," SECT. 3, TO NEWSPAPER REPORT OF JUDICIAL PROCEEDINGS.

[Heading as in Form No. 4.]

Defence.

1. The defendants admit the publication of the words alleged in the — newspaper of the date mentioned, but they deny that the same were published maliciously.

2. The words alleged are part of a fair and accurate report of proceedings on the trial of an action in which G. W. was plaintiff and the said R. P. was defendant, which proceedings were publicly heard on — the — day of —, 19—, before

(n) It is very doubtful if an injunction could be legally enforced in an action of libel against a newspaper proprietor, in the event of disobedience to the injunction. *Vide supra*, note (u), p. 329.

a court exercising judicial authority, to wit, a Court of Nisi Prius, in which the Hon. Mr. Justice D—— was the judge, and which said report was published contemporaneously with such proceedings.

[Conclude as in Form No. 4.]

NO. 29. FORM OF REPLY TO DITTO.

[Heading as in Form No. 17.]

Reply.

The plaintiff says—

That he takes issue on the defence, except as to such parts thereof as contain admissions of the publication, and of such other parts as allege that the trial of the said action was publicly heard on — the — day of —, 19—, before a court exercising judicial authority (viz.) a Court of Nisi Prius in which the Hon. Mr. Justice D—— was the judge.

[Conclude as in Form No. 17.]

NO. 30. STATEMENT OF CLAIM FOR DAMAGES AND INJUNCTION IN AN ACTION FOR LIBEL ON THE MANAGING DIRECTOR OF A COMPANY.

[Heading as in Form No. 3.]

Statement of Claim.

1. The plaintiff is managing director of The — Company (Limited), carrying on business at No. —, — Street, in the City of London.

2. The defendant falsely and maliciously printed and published, and caused and procured to be printed and published of and concerning the plaintiff and of and concerning him in his office of managing director of the said company, the words and figures following (that is to say)—[*Here set out the libel, with appropriate innuendoes where necessary.*] The defendant meaning thereby, &c. [*according to the facts*].

The plaintiff claims—

(a) Damages: £——

(b) An injunction restraining the defendant from the further circulation and publication of the libellous matters aforesaid.

(Signed)

Delivered the — day of —, 19—.

No. 31.

[Commence as in Form No. 4.]

Defence.

1. The defendant is a shareholder in the said — Company (Limited).

2. The defendant says that the matters complained of in paragraph No. 2, are, in their natural and obvious meaning, true in substance and in fact.

3. The defendant denies that he published the same maliciously, and says that the matters complained of were communications made by him, as such shareholder as aforesaid, to his fellow shareholders in the said company, and related to matters in which he and they had a common interest (*viz.*), the affairs of the said company, the management thereof, and the welfare and success of the business of the said company; and the said communications were made *bonâ fide*, without malice, and with a view to such common interest, and were privileged.

4. The defendant denies that the matters complained of convey, or were intended to convey, the meaning alleged by the innuendo to paragraph No. 2 of the Statement of Claim.

(Signed)

Delivered the — day of —, 19—.

No. 32. FORM OF APOLOGY AND PAYMENT INTO COURT UNDER THE LIBEL ACT, 1843 (6 & 7, VICT. c. 96, s. 2), IN AN ACTION FOR LIBEL PUBLISHED IN A NEWSPAPER.

[Commence as in Form No. 4.]

The alleged libel was contained in a public newspaper [*or periodical publication, as the case may be*], called “The —,” published weekly [*daily or monthly, as the case may be*], and was inserted therein without actual malice, and without gross negligence, and before [*or at the earliest opportunity after, as the case may be*], the commencement of this action, to wit, on the — day of —, the defendant inserted in the said newspaper a full apology for the said libel [*or offered to publish a full apology for the said libel in any newspaper to be selected by the plaintiff*], and the defendant now brings into court the sum of £— ready to be paid to the plaintiff by way of

amends for the injury sustained by the plaintiff by and through the publication of the alleged libel, and the defendant says that the said sum is sufficient to satisfy the claim of the plaintiff in respect of the alleged cause of action (o).

No. 33. ANOTHER FORM.

In &c.

19—. W. No. —.

Between A—— J—— W——, plaintiff,

and

T. F——, J. T. F——, and A. F——

(sued as T—— F—— & Sons), defendants.

Defence.

1. The defendants, as to paragraphs Nos. 2 and 3 of the Statement of Claim, say that "The —— Journal" is a public newspaper and the alleged libel was inserted therein without actual malice and without gross negligence.

2. And the defendants further say, that before the commencement of this action, to wit, on the —— day of ——, 19—, and immediately on the defendants' attention being called to the alleged libel they inserted in the said newspaper called "The —— Journal," in the print thereof published on the —— day of ——, 19—, a full apology for the alleged libel, the said apology being in the words and figures following (that is to say) [*here copy apology verbatim*].

3. The defendants now bring into court the sum of £—— ready to be paid to the plaintiff by way of amends for the injury sustained by the plaintiff by and through the publication of the alleged libel, and the defendants say that the said sum is sufficient to satisfy the claim of the plaintiff in respect of the alleged cause of action.

4. The defendants do not admit the allegations contained in paragraph No. 5 of the Statement of Claim, nor any or either of them.

(Signed)

Delivered the —— day of ——, 19—.

No. 34. [Commence as in Form No. 17.]

Reply.

1. The plaintiff as to so much of paragraph No. 1 of the Defence as states that the alleged libel was inserted in the

(o) *Vide supra*, p. 225, as to payment into court.

said newspaper without actual malice, and without gross negligence, takes issue thereon.

2. As to paragraph No. 2 of the defence the plaintiff takes issue thereon.

3. As to paragraph No. 3 the plaintiff says that the sum brought into court is not enough to satisfy the claim of the plaintiff in respect of the matters therein referred to.

[Conclude as in Form No. 17.]

No. 95. FORM OF PARTICULARS OF EVIDENCE IN MITIGATION OF DAMAGES. (R. S. C., Ord. XXXVI., r. 37.)

In the High Court of Justice, 19—. B. No.—.
King's Bench Division.

Between A—— B——, plaintiff,
and
C—— D——, defendant.

Particulars of evidence in mitigation of damages.

Take notice that the defendant intends on the trial of this action to give evidence in chief (with a view to the mitigation of damages), as to the circumstances under which the alleged libel was published [*or as to the character of the plaintiff*]; particulars of which are as follows:—

- | | |
|---|--------------------------------------|
| 1. That before the publication
of the alleged libel, the
plaintiff, &c. | } [<i>According to the facts.</i>] |
| 2. That on the —— day of ——,
&c. | |
| 3. That the defendant, &c. | |

(Signed)

Dated this —— day of ——, 19—.

—— of, &c.

Solicitor for the defendant.

To ——,

Solicitor for the plaintiff.

NO. 36. NOTICE OF INTENTION TO GIVE EVIDENCE OF AN
APOLOGY IN MITIGATION OF DAMAGES, UNDER THE LIBEL
ACT, 1843 (6 & 7 VICT. c. 96, s. 1).

In the High Court of Justice,
King's Bench Division.

Between J—— W——, plaintiff,
and
R—— P——, defendant.

Take notice, that the defendant intends on the trial of this action to give in evidence, in mitigation of damages, that he made [*or offered, as the case may be*] an apology to the plaintiff for the defamation complained of in the statement of claim herein, before the commencement of this action [*or as soon after the commencement of this action as there was an opportunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering such apology*] which said apology is in the words and figures following, viz.—[*here set out apology verbatim*].

(Signed)

Delivered this —— day of ——, 19——.

FORMS OF PROCEDURE IN ACTIONS OF SLANDER AND
LIBEL, REMITTED FOR TRIAL IN COUNTY COURTS.

Forms Nos. 37 to 44 are from the Appendix to the County Court Rules, 1908.

NO. 37. STATEMENT OF PLAINTIFF'S CAUSE OF ACTION, IN
ACTION OF TORT REMITTED FOR TRIAL IN A COUNTY COURT.

In the County Court of
holden at

Between A—— B——,
[address and description]
and
C—— D——,
[address and description]

Being an action of tort commenced in the High Court of Justice, and remitted by order of a judge [*or master or district registrar*] thereof under section 66 of "The County Courts Act, 1888," to be tried in this court.

No. 38. LIBEL.

The defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following: "*he is a liar, a blackguard and a scoundrel*;" and the plaintiff claims £200 damages.

No. 39. LIBEL OF PLAINTIFF IN THE WAY OF HIS TRADE.

[Commence as in Form No. 37.]

The defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff in the way of his trade as a grocer, the words following: "*Mr. A. B. sands his sugar and dusts his pepper*," whereby the plaintiff was injured in his trade, and lost the custom of several persons, particularly X., Y. and Z., who had before dealt at the plaintiff's shop; and the plaintiff claims £50 damages.

No. 40. SLANDER.

[Commence as in Form No. 37.]

The defendant falsely and maliciously spoke and published of and concerning the plaintiff the words following: "*A. B. is a thief, and stole Mr. Brown's ducks*;" and the plaintiff claims £30 damages.

No. 41. SLANDER OF PLAINTIFF IN THE WAY OF HIS CALLING.

[Commence as in Form No. 37.]

The defendant falsely and maliciously spoke and published of and concerning the plaintiff, in the way of his business and calling as a rat-catcher, the words following: "*A. B. is a great rogue, and instead of doing his best to kill the rats he encourages the breed, so that he may have more employment from the farmers*," whereby the plaintiff was injured in his business, and several farmers, particularly X., Y. and Z., who had usually employed him to kill the rats on their farms, ceased to do so; and the plaintiff claims £20 damages.

No. 42. NOTICE OF SPECIAL DEFENCE.

(*Libel or Slander.*)

Take notice, that the defendant intends at the hearing of this action to give in evidence and rely upon the following grounds of defence—

That the libel [*or slander*] complained of is true in substance and in fact.

Dated this — day of —, 19—.

(Signed by defendant or his solicitor.)

To the Registrar of the Court.

No. 43. NOTICE TO BE GIVEN BY DEFENDANT UNDER THE LIBEL ACT, 1843 (6 & 7 VICT. C. 96, s. 1), IN AN ACTION FOR LIBEL OR SLANDER, REMITTED FOR TRIAL IN A COUNTY COURT.

Being an action for libel [*or slander*] commenced in the High Court of Justice, and remitted by order of a judge [*or master or district registrar*] thereof under section 66 of "The County Courts Act, 1888," to be tried before this court.

Take notice, that the defendant on the trial of this action will give in evidence in mitigation of damages that he made [*or offered*] an apology to the plaintiff for the libel [*or slander*] complained of before the commencement of the action [*or as soon after the commencement of the action as he had an opportunity of so doing*].

Dated this — day of —, 19—.

(Signed by defendant or his solicitor.)

To the Registrar of the Court
and to the plaintiff.

No. 44. NOTICE TO BE GIVEN BY DEFENDANT UNDER THE LIBEL ACT, 1843 (6 & 7 VICT. C. 96, s. 2), IN AN ACTION FOR LIBEL REMITTED FOR TRIAL IN A COUNTY COURT.

Being an action for libel commenced in the High Court of Justice and remitted by order of a judge [*or master, or district registrar*] thereof under section 66 of "The County Courts Act, 1888," to be tried before this court.

Take notice, that the defendant on the trial of this action will give in evidence and rely upon the following ground of defence: (that is to say),

That the libel was inserted in the newspaper called or known by the name of — without actual malice and without gross negligence, and that before the commencement of the action [or as soon after the commencement of the action as he had an opportunity of doing so] the defendant inserted in the said newspaper [or offered to publish in any newspaper or periodical publication to be selected by the plaintiff] a full apology for the said libel, and that the defendant has paid into court £—— by way of amends for the injury sustained by the plaintiff by the publication of the said libel.

Dated this —— day of ——, 19—.

C. D., defendant,

or

E. F., defendant's solicitor.

To the Registrar of the Court and to the plaintiff.

[N.B.—If the libel was published in any periodical publication other than a newspaper, alter the notice accordingly.]

CRIMINAL PROCEDURE : PRECEDENTS.

INDICTMENTS.

NO. 45. INDICTMENT FOR LIBEL AT COMMON LAW.

Cumberland) The Jurors for our Sovereign Lord the King
to wit.) upon their oath present that (p) A——
B—— contriving and unlawfully, wickedly, and maliciously
intending to defame, injure, vilify and aggrieve one C——
D—— and to bring him into hatred, contempt, and ridicule
[or disgrace, as the case may be] on the —— day of —— in the
year 19—, unlawfully, wickedly, and maliciously did write and
publish and cause and procure to be written and published a
[false (q)], malicious and defamatory libel of and concerning
the said C—— D—— containing (amongst others) the [false],
malicious, and defamatory words and statements following
(that is to say) [*here set out the libel, or such parts thereof as
may be necessary, adding appropriate innuendoes, should such be
required, to show its application to the prosecutor, and its
defamatory nature*] to the great scandal, infamy, and disgrace

(p) Where preliminary averments are necessary (as in the case of libel of a person in office, &c.), they should here be stated by way of inducement.

(q) A libel is indictable whether true or false; the word "false" should therefore only be used when the libel can (if necessary) be *proved* to be false.

of the said C—— D—— to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity.

Add such other counts as may be necessary.

No. 46. INDICTMENT FOR PUBLISHING A LIBEL KNOWING IT TO BE FALSE (*r*).

Kent } The Jurors for our Sovereign Lord the King upon
to wit. } their oath present that W—— R—— contriving and unlawfully, wickedly, and maliciously intending to defame and injure one G—— W—— and to deprive him of his good name, fame, credit, and reputation, and to bring him into public contempt, infamy, and disgrace, on the —— day of ——, in the year 19——, unlawfully, wickedly, and maliciously, did write and publish, and cause and procure to be written and published, of and concerning the said G—— W——, a false, malicious, and defamatory libel, containing the false, malicious, and defamatory words and statements of and concerning the said G—— W—— following, that is to say [*here set out the libel, with such innuendoes as may be necessary*] he the said W—— R—— then well knowing the said defamatory libel and the said defamatory words and statements to be false, contrary to the statute in that case made and provided, and against the peace of our Lord the King, his crown and dignity.

No. 47. INDICTMENT FOR THREATENING TO PUBLISH (OR ABSTAIN FROM PUBLISHING) A LIBEL, WITH INTENT TO EXTORT (*s*).

Norfolk } The Jurors for our Sovereign Lord the King upon
to wit. } their oath present that G—— K—— on the —— day of —— in the year 19——, unlawfully did threaten to publish [*or to abstain from publishing, or to prevent the publishing*] of one D—— N—— a certain libel touching and concerning the said D—— N——, with intent thereby to extort money, to wit £5 [*or security for money, to wit, a promissory note for £50, under the hand of S—— F——, bearing date, &c., &c.*] from the said D—— N——, which said libel is in the words

(*r*) The Libel Act, 1843 (6 & 7 Vict. c. 96, s. 4).

(*s*) The Libel Act, 1843 (6 & 7 Vict. c. 96, s. 3).

and figures following, that is to say [*here set out the libel, with innuendoes if necessary to make it intelligible*], contrary to the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity.

No. 48. INDICTMENT FOR A LIBEL IN A PICTURE OR PRINT.

County of — } The Jurors for our Sovereign Lord the King
to wit. } upon their oath present that F—— T——
W—— unlawfully, wickedly, and maliciously devising, contriving, and intending to injure, defame, and aggrieve one R—— E—— N—— and to bring him into public hatred, contempt, and ridicule, on the —— day of —— in the year 19——, unlawfully, wickedly, and maliciously, did make, draw, design, contrive, and publish and cause and procure to be made, drawn, designed, contrived, and published of and concerning the said R—— E—— N—— a certain false, scandalous, malicious, and defamatory libel, in the form of a picture, print, and matter on paper, representing the said R—— E—— N—— as &c. [*state fully according to the facts*] the said F—— T—— W—— meaning thereby that the said R—— E—— N—— was &c. [*according to the facts*] to the great scandal, ridicule, and disgrace of the said R—— E—— N——, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity.

Add other counts according to the circumstances.

No. 49. INDICTMENT AT COMMON LAW, FOR A BLASPHEMOUS LIBEL.

—— } The Jurors for our Sovereign Lord the King upon
to wit. } their oath present that P—— R——, being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the —— day of ——, in the year 19——, unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed, and published, a scandalous, impious, blasphemous, and profane libel of and concerning the

Holy Scriptures and the Christian religion, in which said libel is contained, amongst other things, the scandalous, impious, blasphemous, and profane statements, matters, and things of and concerning the Holy Scriptures and the Christian religion, following, that is to say, [*here set out the libel*], to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

NO. 50. INDICTMENT FOR SENDING A CHALLENGE TO FIGHT
A DUEL.

— } The Jurors, &c., [as in form No. 45]. That F——
to wit. } B——, being a person of a quarrelsome, wicked and
malicious disposition, and contriving and intending not only
to vex, injure, and disquiet one C—— P——, and do and procure
the said C—— P—— some grievous bodily harm, but also
to provoke, instigate, and excite the said C—— P—— to
break the peace, and to fight a duel with and against him the
said F—— B——, on the — day of —, in the year 19—,
unlawfully, wickedly, and maliciously did write, send, and
deliver, and cause and procure to be written, sent, and
delivered to him the said C—— P—— a certain letter and
paper writing, containing a challenge to fight a duel with and
against him the said F—— B——, and which said letter and
paper writing is in the words and figures following, that is to
say [*here set out the letter, with innuendoes if necessary to make
it intelligible*], to the great damage, scandal, and terror of the
said C—— P——, in contempt of our lord the King and his
laws, to the evil example of all others, and against the peace
of our lord the King, his crown and dignity.

2nd Count.—And the Jurors aforesaid, upon their oath
aforesaid, do further present that the said F—— B——,
contriving and intending as aforesaid, afterwards, to wit, on the
day and year aforesaid, unlawfully, wickedly, and maliciously
did provoke, instigate, excite and challenge the said C——
P—— to fight a duel with and against him, the said F——
B——, to the great damage, scandal, and terror of the said
C—— P——, in contempt of our lord the King and his laws,
to the evil example of all others, and against the peace of our
lord the King, his crown and dignity.

F.S.

O O

No. 51. INDICTMENT FOR WORDS PROVOKING ANOTHER TO
SEND A CHALLENGE.

County of ——— } The Jurors, &c. [as in form No. 45]. That
to wit. } F—— B——, being a person of a quarrel-
some, wicked, and malicious disposition, and contriving and
intending not only to vex, injure, and disquiet one C——
P——, and do and procure the said C—— P—— some grievous
bodily harm, but also to provoke, instigate, and excite the
said C—— P—— to break the peace, and to fight a duel with
and against him, the said F—— B——, on the ——— day of
——, in the year 19——, unlawfully, wickedly, and maliciously
did utter, pronounce, declare, and say to and in the presence
and hearing of the said C—— P——, the words following,
that is to say [*here set out the words verbatim, with innuendoes
if necessary*], with intent to instigate, excite, and provoke the
said C—— P——, to challenge him, the said F—— B——, to
fight a duel with and against him the said C—— P——, to
the great damage, &c. [as in the preceding precedent].

No. 52. INDICTMENT FOR A LIBEL ON A LADY DECEASED,
ACCUSING HER OF INCONTINENCE.

That A—— B——, late of, &c., wickedly and maliciously
contriving and intending to injure, defame, disgrace, and vilify
the memory, reputation, and character of E—— D——, late
of &c., widow, deceased, relict of M—— J—— D——, Esquire,
late of, &c., also deceased, and to bring R—— D——, K——
D——, and others, the sons, daughters, and descendants of
the said E—— D—— into great scandal, infamy, and con-
tempt, and to stir up, and excite, and provoke them to a
breach of the peace, and to cause it to be believed that the
said E—— D—— in her lifetime was a person of depraved,
vicious, and lewd mind and disposition and incontinent
behaviour, and destitute of conjugal affection and fidelity
towards her said husband, the said M—— J—— D——, and
that the said E—— D—— had led a wicked, profligate, and
adulterous course of life, and had been continually from the
time of her marriage with the said M—— J—— D—— till
near the time of her decease addicted to promiscuous and
adulterous intercourse with divers menial servants in the
service of her the said E—— D—— on, &c., wickedly,

maliciously, and unlawfully did print and publish, and cause to be printed and published, in a certain newspaper called and entitled, &c., a certain false, scandalous, and malicious libel of and concerning her the said E—— D—— [*here set forth the libel, with the necessary innuendoes*], to the great disgrace and scandal of the memory, reputation, and character of the said E—— D——, and to the scandal, infamy, and disgrace of the said R—— D——, K—— D——, and others, and against the peace, &c.

No. 53. INDICTMENT FOR SEDITIOUS WORDS.

—— } The Jurors for our sovereign lord the King upon
to wit. } their oath present that A—— B——, being a wicked,
malicious, seditious, and evil-disposed person, and wickedly,
maliciously, and seditiously contriving and intending the peace
of our lord the King and of this realm to disquiet and disturb,
and the liege subjects of our said lord the King to incite and
move to hatred and dislike of the person of our said lord the
King and of the government established by law within this
realm, and to incite, move, and persuade divers of the liege
subjects of our said lord the King to riots, tumults, insurrec-
tions, and breaches of the peace, and to prevent by force of
arms the execution of the laws of this realm, and the pre-
servation of the public peace, on the —— day of —— in the
year 19——, in the presence and hearing of divers, to wit, fifty
of the liege subjects of our said lord the King then assembled
together, in a certain speech and discourse by him the said
A—— B—— then addressed to the said liege subjects so
then assembled together as aforesaid, unlawfully, wickedly,
maliciously, and seditiously, did publish, utter, pronounce,
and declare with a loud voice, of and concerning our said
lord the king and the Crown of this realm, and the govern-
ment established by law within this realm, and of and con-
cerning the liege subjects of our said lord the King, amongst
other words and statements, the false, wicked, seditious, and
inflammatory words and statements following, that is to say
[*here set out the words verbatim*], in contempt of our said
lord the King in open violation of the laws of this realm, to
the evil and pernicious example of all others in the like case
offending, and against the peace of our said lord the King, his
crown and dignity.

For other Forms of Indictment for seditious speeches, *vide The Queen v. Crowe*, 3 Cox, C. C. 128; *The Queen v. Burns and others*, 16 Cox, C. C. 356.

NO. 54. PLEA TO INDICTMENT OR INFORMATION FOR A LIBEL, JUSTIFYING THE PUBLICATION ON THE GROUND OF ITS TRUTH AND BENEFIT TO THE PUBLIC. LIBEL ACT, 1843 (6 & 7 VICT. c. 96, s. 6) (t).

In the High Court of Justice,
King's Bench Division.

The — day of — A.D. 19—.

The King } And J— H— B— in his own proper
v. } person cometh into court, and having heard the
J. H. B. } said indictment [or information as the case may
be] read, says that the alleged defamatory libel and matters charged against him, the said J— H— B—, in and by the said indictment [or information], as written and published by him, the said J— H— B—, of and concerning the said W— R— are true in this, that, &c. [*stating concisely the facts relied on as justifying the libel on the ground of its truth*]. And the said J— H— B— further saith, that it was for the public benefit that the said alleged defamatory libel, and matters charged in and by the said indictment [or information] as written and published of and concerning the said W— R—, should be written and published, because, &c. [*stating the fact or facts relied on as excusing the publication on the ground of the benefit to the public*], whereby and by reason whereof it was and is for the public benefit that all and every the said alleged defamatory libel and matters charged in and by the said indictment [or information] should be published (u).

INFORMATIONS.

NO. 55. INFORMATION EX OFFICIO BY ATTORNEY-GENERAL.

The — day of — A.D. 19—.

Middlesex } Be it remembered that Sir John Lawson Walton,
to wit. } Knight, Attorney General of our sovereign lord
the King, who for our said lord the King prosecuteth in this

(t) *Vide supra*, pp. 480 *et seq.*, as to the requisites of this plea.

(u) This plea must be signed by counsel, and filed at the Crown Office, and a copy delivered to the prosecutor or complainant.

behalf, in his proper person comes here into the King's Bench Division of His Majesty's High Court of Justice before the King himself, at the Royal Courts of Justice, and for our said lord the King gives the court here to understand and be informed that C—— D—— on the —— day of —— [*here describe the offence precisely, as in an indictment*], in contempt of our said lord the King and his laws, to the evil example of all others, and against the peace of our said lord the King, his crown and dignity.

2nd count.—And the said Attorney-General of our said lord the King, who prosecutes as aforesaid, further gives the court here to understand and be informed that the said C—— D—— on, &c. [*state the offence as in a second count in an indictment*] in contempt, &c. [*as above*].

Whereupon the said Attorney-General of our said lord the King, who prosecutes in this behalf for our said lord the King, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said C—— D—— in this behalf, to make him answer to our said lord the King, touching and concerning the premises aforesaid.

No. 56. INFORMATION IN THE NAME OF THE MASTER OF THE CROWN OFFICE.

[Heading as in No. 54.]

The —— day of ——, A.D. 19—.

Essex } Be it remembered that James Robert Mellor, Esquire,
to wit. } coroner and attorney of our sovereign lord the King,
who prosecutes for our said lord the King in this behalf, in his proper person comes here into the King's Bench Division of His Majesty's High Court of Justice before the King himself, at the Royal Courts of Justice, on [*the day the order nisi was made absolute*] the —— day of —— in the year 19—, and for our said lord the King gives the court here to understand and be informed that A—— B—— on, &c. [*here state the offence with the same precision as in an indictment, and conclude each count according to the nature of the offence as follows.*] To the great damage of him the said ——, to the evil example of others in the like case offending, and against the peace of our said lord the King, his crown and dignity.

2nd count.—And the said coroner and attorney of our said

lord the King who for our said lord the King in this behalf prosecutes, further giveth the court here to understand and be informed that the said A—— B—— on, &c. [*state offence as in a second count of an indictment.*]

Whereupon the said coroner and attorney of our said lord the King, who prosecutes in this behalf for our said lord the King, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said A—— B—— in this behalf, to make him answer to our said lord the King, touching and concerning the premises aforesaid.

(To be signed by the said coroner and attorney.)

No. 57. PLEA OF NOT GUILTY TO INFORMATION FOR LIBEL.

In the High Court of Justice,

King's Bench Division.

Middlesex [or other venue].

The King against C—— W—— R——.

And now, that is to say, on the —— day of ——, in the year 19—, before the King himself, in the King's Bench Division of His Majesty's High Court of Justice, at the Royal Courts of Justice, comes the said C—— W—— R—— by ——, his solicitor, and having heard the said information read, he says that he is not guilty thereof, and hereupon he puts himself upon the country.

No. 58. INFORMATION FOR A LIBEL REFLECTING ON THE CHASTITY, &c., OF THE RELATOR'S DECEASED WIFE.

That before the time of printing and publishing of the wicked, false, scandalous, malicious, and defamatory libel hereinafter next mentioned, C., late the wife of Sir J. W., Baronet, commonly called Lady C. W., died, leaving the said Sir J. W. her surviving, to wit, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap; and that Robert Thomas Weaver, late of London aforesaid, printer; Thomas Arrowsmith, late of London aforesaid, gentleman; and William Shackell, late of London aforesaid, printer; being persons of a wicked and malicious disposition, and wickedly and maliciously contriving and intending to injure, defame, disgrace and vilify the memory, reputation, and character of the said C., late the wife of the

said Sir J. W., Baronet, commonly called Lady C. W., then deceased, and to cause it to be believed that the said C., during her lifetime, was a person of immoral, unchaste, and licentious conduct, and to bring the said Sir J. W., the surviving husband of the said C., and the children, family, and relations of the said C. into great scandal, infamy, contempt, and disgrace; and to stir and excite them to a breach of the peace of our said sovereign lord the King, on, &c., in the first year of the reign, &c., aforesaid, at, &c., wickedly, maliciously, and unlawfully did print and publish, and cause to be printed and published, in a certain newspaper called "John Bull," a certain wicked, false, scandalous, malicious, and defamatory libel of and concerning the said C., late the wife of the said Sir J. W., entitled "Queen's Visitors"; in one part of which said libel is contained the false, scandalous, malicious, and defamatory matter following: that is to say, "Having gone through the list of the Queen's female visitors, and there appearing no probability of any increase to it, we cannot but call the serious attention of our readers to the names which we have laid before them in the course of our analysis. It is to be remarked, not whether the persons named (with a few exceptions) are disreputable and unfit associates for a queen at any time, but that at the moment when we are told that thousands of people are assured of her innocence, we find, putting their rank and quality out of the question, a list of twenty-six names of ladies who have, during seven months, visited Brandenburg House. From these twenty-six we shall, in conclusion, subtract those who were by various circumstances influenced in their conduct, and leave the net produce to the judgment of our readers, and the respectability of insulted majesty"; and in another part thereof is contained the false, scandalous, malicious, and defamatory matter following, of and concerning the said C., late the wife of the said Sir J. W., Baronet, commonly called Lady C. W. (that is to say), "Countess of T., Lady Mary B., Mrs. H. G. B. and Lady O. (a foreigner), could not refuse the solicitations of the men of the family, Lady C. W. (then and there meaning the said C., late the wife of the said Sir J. W., commonly called Lady C. W.), Lady T.'s daughter and Lady M.'s sister having been detected in a criminal intrigue with her menial servant" (then and there meaning and intending that the said C., late the wife of the said Sir J. W., commonly called Lady C. W., had been in her lifetime guilty of a criminal intrigue with her menial

servant), to the great disgrace and scandal of the memory, reputation, and character of the said C., to the great damage and infamy of the said Sir J. W., and the said children, family, and other relations of the said C., late the wife of the said Sir J. W., to the evil example of all others, and against the peace of our said lord the King, his crown and dignity. And the said coroner and attorney of our said present sovereign lord the King, giveth the court here further to understand and be informed, that before the time of the publishing the wicked, false, scandalous, malicious, and defamatory libel hereinafter next mentioned, the said C., late the wife of the said Sir J. W., Baronet, commonly called Lady C. W., died, leaving the said Sir J. W. her surviving, to wit, at, &c., aforesaid, and that the said R. T. W., T. A., and W. S., being such wicked and maliciously disposed persons as aforesaid, and wickedly and maliciously contriving and intending as aforesaid, at, &c., did wickedly, maliciously, and unlawfully publish, in a certain newspaper called "John Bull," a certain other wicked, false, scandalous, malicious, and defamatory libel, of and concerning the said C., late the wife of the said Sir J. W. (commonly called Lady C. W.), entitled "Queen's Visitors"; in one part of which said last-mentioned libel is contained the false, scandalous, malicious, and defamatory matter following (that is to say) [*setting out the libel as before*] (then and there meaning and intending that the said C., late the wife of the said Sir J. W., commonly called Lady C. W., had been in her lifetime guilty of a criminal intrigue with her menial servant), to the great scandal of the memory, reputation, and character of the said C., to the great damage, disgrace, and infamy of the said Sir J. W., and the children, family, and other the relations of the said late wife of the said Sir J. W., to the evil example of others, and against the peace of our said lord the King, his crown and dignity. [*There were two other counts stating parts only of the libel.*] Whereupon the said coroner and attorney of our said lord the King, &c. [*Usual conclusion of information.*]

NO. 59. INFORMATION FOR LIBEL CONTAINED IN A PUBLICATION OF LECTURES DELIVERED BY A ROMAN CATHOLIC PRIEST (x).

In the Queen's Bench,

Michaelmas Term, 15th Vict., 1851.

Middlesex. } Be it remembered, that C. F. Robinson, Esquire, coroner, and attorney of our lady the Queen in the Court of Queen's Bench, who prosecutes for our said lady the Queen in this behalf, comes here into the said court at Westminster, the 21st day of November, in the 15th year of the reign of our said Lady, and gives the court to understand and be informed, that John Henry Newman, Doctor of Divinity, late of the parish of Aston, in the county of Warwick, contriving and wickedly and maliciously intending to injure and vilify one Giovanni Giacinto Achilli, and to bring him into great contempt, scandal, infamy, and disgrace, on the 1st of October, 1851, did falsely and maliciously compose and publish a certain false, scandalous, malicious, and defamatory libel, containing divers false, scandalous, malicious, and defamatory matters concerning the said G. G. Achilli, that is to say:—

[The information then set out the libel verbatim, with the usual innuendoes] (y). Which said false, scandalous, malicious, and defamatory libel the said J. H. Newman did then publish, to the great damage, scandal, and disgrace of the said G. G. Achilli, in contempt of our said lady the Queen, and believes to the evil and pernicious example of all others in the like case offending, against the peace of our said lady the Queen, her crown and dignity. Whereupon the said coroner and attorney of our said lady the Queen, who for our said lady the Queen in this behalf prosecuteth, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against the said J. H. Newman in this behalf, to make him answer to our said lady the Queen touching and concerning the premises aforesaid.

(x) The following information, pleas, &c., are from a "Report of the Trial and Preliminary Proceedings in the case of *The Queen* on the prosecution of *Achilli v. Newman*" (1852), by the late W. F. Finlason.

(y) For a statement of the libel, see Finlason's Report of the Trial and Proceedings, p. 45.

No. 60. SPECIAL PLEAS TO THE ABOVE.

In the Queen's Bench,

Michaelmas Term, 15th Vict., 1851.

<p>The Queen v. J. H. Newman.</p>	}	<p>And the said J. H. Newman appears here in court, by Henry Lewin, his attorney, and the said information is read to him, which being by him heard and understood, he complains to have been grievously vexed and molested under colour of the premises, and the less justly because he saith that he is not guilty of the said supposed offences in the said information alleged, &c.</p>
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And for a further plea the said J. H. Newman saith: That &c. [The plea then, in 23 separate paragraphs, professes to justify every charge contained in the information, specifying the dates and places of the alleged misconduct, with other particulars where necessary] (z).

And the said J. H. Newman further saith, that at the time of publishing of the said alleged libel, it was for the public benefit that the matters therein contained should be published, because he says that great excitement prevailed, and numerous public discussions had been held in divers places in England, on divers matters of controversy between the Churches of England and Rome, with respect to which it was important the truth should be known; and inasmuch as the said G. G. Achilli took a prominent part in such discussions, and his opinion and testimony were by many persons appealed to and relied on as of a person of character and respectability, with reference to the matter in controversy, it was necessary for the purpose of more effectually examining and ascertaining the truth, that the matters in the said alleged libel should be published and known, in order that it might more fully appear that the opinion and testimony of the said G. G. Achilli were not deserving of credit or consideration, by reason of his previous misconduct; and also because the said G. G. Achilli had been and was, at Birmingham, Leamington, Brighton, Bath, Cambridge, Huntingdon, Winchester, and elsewhere, endeavouring by preaching and lecturing to excite discord and animosity towards Her Majesty's Roman Catholic subjects, and against the religion and practice of persons professing the Roman Catholic religion, against the peace of our said lady the Queen; and it was of importance and conducive to the

(z) See Finlason's Report of the Trial, &c., where the plea is fully set out.

diminishing of such discord and animosity, and to preserve the peace of our said lady the Queen, that the said matters should be published and known to all the liege subjects of our said lady the Queen ; and also because the said G. G. Achilli had improperly pretended to such subjects that he was a person innocent of the said crimes and misconduct, and that he was greatly injured by the said foreign ecclesiastical tribunals, and that he had been persecuted and oppressed by the Roman Catholic Church and by the bishops and authorities thereof, on account of his religious opinions, and that he was a martyr, on account of his religious opinions ; and by means of such improper pretences was endeavouring, and was likely to obtain credit and support from such subjects, by reason of their being ignorant of the said misconduct of the said G. G. Achilli, it then became, and was of public importance, and for the public benefit, to expose the impropriety and want of truth of such pretences, and to prevent the said subjects being deceived and misled by such pretences, and to have the real character of the said G. G. Achilli, and his conduct, made known to such subjects and the public in general. And also because many benevolent persons and the public generally were at that time disposed to show kindness and give assistance to the said G. G. Achilli, on the ground of his having been harshly and unjustly treated by the said Court of the Holy Office or Inquisition, and by the said superior of the said order of St. Dominic, and on the ground that he was a person deserving of kindness and assistance ; and it was for the benefit of the public that the said matters should be published, for the purpose of showing that the said G. G. Achilli had been treated fairly and properly, and according to his deserts, by the said court and the said superior ; and that the said G. G. Achilli is a person wholly undeserving of kindness and assistance, and because the said G. G. Achilli had obtained and was likely again to obtain preferment and employment of public trust and confidence, which he was unfit to obtain by reason of the said matters, and which he had obtained and was likely to obtain only by reason of the said matters being unknown, and unpublished. And so the said J. H. Newman says he published the said alleged libel, as he lawfully might, for the causes aforesaid ; and this the said J. H. Newman is ready to verify. Wherefore he prays judgment, &c.

(Signed) Edward Badeley.

No. 61. REPLICATION.

In the Queen's Bench,

Hilary Term, 16th Vict., 1852.

<p>The Queen v. J. H. Newman.</p>	}	<p>The said C. F. Robinson, Esquire, coroner and attorney, &c., as to the plea first pleaded, puts himself upon the country; and, as to the plea secondly pleaded, saith, that the said J. H. Newman, of his own wrong, and without the cause in his said plea alleged, composed and published the said libel, as in the said information alleged, &c.</p>
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No. 62. REJOINDER.

In the Queen's Bench,

Hilary Term, 16th Vict., 1852.

<p>The Queen v. J. H. Newman.</p>	}	<p>And the said J. H. Newman, as to the replication of the said C. F. Robinson, puts himself upon the country, &c.</p>
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No. 63. INFORMATION FOR A LIBEL, alleging it to have been published with intent to defame and vilify a certain Religious Order and Community called "The Scorton Nunnery," and certain persons, being the Lady Abbess and Nuns of the said Order, and certain other persons, being the Chaplains thereof. *Vide 2 Lewin's Crown Cases, p. 238, Gathercole's case.*

Forms Nos. 64 to 76 are from the Appendix to the Crown Office Rules, 1906.

No. 64. NOTICE TO A JUSTICE OF THE PEACE OF INTENTION
TO APPLY FOR A CRIMINAL INFORMATION.

To A—— B——, Esquire, one of His Majesty's Justices assigned to hear and determine divers crimes, trespasses and other offences committed within the county of ——.

Take notice, that the King's Bench Division of His Majesty's High Court of Justice will be moved on the —— day of —— or so soon after as counsel can be heard on behalf of C —— D ——, for an order to show cause why an information should not be exhibited against you for certain misdemeanours, in

unlawfully, maliciously and corruptly, and contrary to your duty as such justice of the peace [*here set out the nature of the offence.*]

Dated, &c.

(Signed)

H—— I——,

Solicitor for the said C—— D——.

No. 65. NOTICE TO SEVERAL JUSTICES.

Commence as above and continue—why one or more information or informations should not be exhibited against you or some or one of you, &c., as above.

No. 66. INFORMATION (CRIMINAL).

Middlesex [or other proper venue] to wit.

Be it remembered, that James Robert Mellor, Esquire, coroner and attorney of our present sovereign lord the King, in the King's Bench Division of His Majesty's High Court of Justice before the King himself, who for our said lord the King in this behalf prosecutes in his own proper person, comes here into court, before the King himself, at the Royal Courts of Justice, London, on [*the day the order was made absolute*], and for our said lord the King gives the court here to understand and be informed that [*state offence and then proceed in the same manner as if it were an indictment*].

2nd Count.—And the said coroner and attorney of our said lord the King for our said lord the King, further gives the court here to understand and be informed that, &c.

(*To conclude.*)

Whereupon the said coroner and attorney for our said lord the King prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said B—— G——, in this behalf to make him answer to our said lord the King, touching and concerning the premises aforesaid.

(Signed)

J. R. Mellor

(King's Coroner and Attorney).

No. 67. INFORMATION EX OFFICIO.

Information by the Attorney-General or Solicitor-General, ex officio.

In the same form, using the name of the Attorney-General [or Solicitor-General] instead of the King's coroner and attorney, thus—Sir John Lawson Walton, Knight, Attorney-General [or Sir William Snowdon Robson, Knight, Solicitor-General] of our present sovereign lord the King, who for our said lord the King in this behalf prosecutes, whereupon, &c., the said Attorney-General, &c., as in the prayer.

No. 68. ENTRY OF PLEA OF NOT GUILTY, OR GUILTY, TO
INDICTMENT OR INFORMATION.

In the High Court of Justice,

King's Bench Division,

[*Middlesex* or other venue]—The King

against

A—— B——.

Enter plea of Not Guilty [*or* Guilty] for the above-named defendant A—— B—— to the indictment [*information or inquisition*] in this prosecution by C—— D——, his solicitor [*or in person*].

Dated, &c.

(Signed) C—— D——, of L——,
Agent for G—— H——,
of Y——, Solicitor for
the said A—— B——.

No. 69. DEMURRER TO INDICTMENT OR INFORMATION.

[Heading as in No. 72.]

And now, that is to say, on the —— day of ——, 19——, before our said lord the King, in the King's Bench Division of His Majesty's High Court of Justice, at the Royal Courts of Justice, London, comes the said A—— B—— by ——, his solicitor [*or in his own proper person*], and having heard the said indictment [*or information*] read, says that our said lord the King ought not further to prosecute him, the said A—— B——, by reason of the premises in the said indictment [*or information*] mentioned because he says that the said indictment

[*or information*], and the matters therein contained are not sufficient in law to compel him, the said A—— B——, to answer thereto; and this he is ready to verify. Wherefore he, the said A—— B——, prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the same indictment [*or information*] specified.

(Signed.)

No. 70. PLEA OF NOT GUILTY, AND JUSTIFICATION PURSUANT TO THE LIBEL ACT, 1843 (6 & 7 VICT. c. 96, s. 6).

[Heading as in No. 68.]

And now, that is to say, on the —— day of ——, 19—, before our said lord the King, in the King's Bench Division of His Majesty's High Court of Justice, at the Royal Courts of Justice, London, comes the said A—— B——, by ——, his solicitor [*or in his own proper person*], and having heard the said indictment read, he says that he is not guilty thereof, and hereupon he puts himself upon the country. And Robert Mellor, Esquire, coroner and attorney of our said lord the King, before the King himself, who for our said lord the King in this behalf prosecutes, does the like.

And for a further plea the said A—— B——, pursuant to the statute in that behalf, says that our said lord the King ought not further to prosecute the said indictment [*or information*] against him because he says that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

And the said A—— B—— further says, that before and at the time of the publication in the said indictment [*or information*] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or information*] should be published, and this he, the said A—— B——, is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment [*or information*] above specified.

(Signed.)

No. 71. REPLICATION TO PLEA OF JUSTIFICATION PURSUANT TO
THE LIBEL ACT (6 & 7 VICT. c. 96, s. 6).

[Heading as in No. 68.]

And as to the plea of the said A—— B——, by him secondly above pleaded James Robert Mellor, Esquire, coroner and attorney of our said lord the King, before the King himself, who for our said lord the King in this behalf prosecutes, says that by reason of anything in the said second plea alleged, our said lord the King ought not to be precluded from further prosecuting the said indictment against the said A—— B——, because he says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any of them true, and this he the said James Robert Mellor, prays may be inquired of by the country, and the said A—— B—— does the like. Therefore let a jury come.

No. 72. DEMURRER BY PROSECUTOR TO DEFENDANT'S PLEA.

[Heading as in No. 68.]

And James Robert Mellor, Esquire, coroner and attorney of our said lord the King, who, for our said lord the King, in this behalf prosecutes, having heard the said plea of the said A—— B——, by him in manner and form above pleaded in bar, for our Lord the King, says, that the said plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, and that he, the said coroner and attorney for our said lord the King, is not bound by the law of the land to answer the same, and this he, the said coroner and attorney, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said coroner and attorney for our said lord the King, prays judgment, and that the said A—— B—— may be convicted of the premises above charged upon him.

(Signed.)

No. 73. JOINDER IN DEMURRER BY PROSECUTOR.

[Heading as in No. 68.]

And James Robert Mellor, Esquire, coroner and attorney of our said lord the King, before the King himself, who for our

said lord the King in this behalf prosecutes, says that our said lord the King ought not to be barred from prosecuting the said indictment [*or from having his aforesaid information*] against the said A—— B——, because he says, that the said indictment [*or information*] and the matters therein contained, are good and sufficient in law to compel him, the said A—— B——, to answer thereto. Therefore, he the said coroner and attorney, for our said lord the King prays judgment, and that the said A—— B—— may be convicted of the premises charged upon him in and by the said indictment [*or information*].

No. 74. JOINDER IN DEMURRER BY DEFENDANT.

[Heading as in No. 72.]

And the said A—— B—— by —— says that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar or preclude our said lord the King from prosecuting the said indictment [*or having his aforesaid information*] against him, the said A. B., and that he is ready to verify and prove the same, as the Court shall award. Wherefore, inasmuch as the said coroner and attorney has not answered or denied the said plea, nor in any manner replied to the same, he the said A—— B—— prays judgment, and that he may be discharged by the court here, of and from the premises by the said indictment [*or information*] above charged upon him.

No. 75. RECORD OF INFORMATION, CRIMINAL, FOR TRIAL.

Pleas before our lord the King, in the King's Bench Division of His Majesty's High Court of Justice, at the Royal Courts of Justice, London, in the year of our Lord, one thousand nine hundred and ——.

Amongst the Pleas of the King's Roll.

Amongst the Informations { [*Middlesex.*]—Be it remembered
of 19—, No. —. { that James Robert Mellor,
Esquire, coroner and attorney of our said lord the King, in the
King's Bench Division of His Majesty's High Court of Justice,
before the King himself, who for our said lord the King in this
behalf prosecutes in his proper person, came here into the

F.S.

P P

King's Bench Division of His Majesty's High Court of Justice, before the King himself, at the Royal Courts of Justice, London, on—, the — day of —, one thousand nine hundred, &c., and for our said lord the King brought into the said court, before the King himself a certain information against C— D—, which said information follows in these words, that is to say [*here set out the information verbatim*].

(z) [Wherefore the sheriff of the county of— was commanded that he should cause him the said A— B—, to come to answer to our said lord the King touching and concerning the premises aforesaid.] And now, that is to say, on the — day of — in the year of our Lord one thousand nine hundred and —, before our said lord the King, at the Royal Courts of Justice, London, comes the said A— B—, by —, his solicitor, and having heard the said information read says, that he is not guilty thereof, and hereupon he puts himself upon the country, and James Robert Mellor, Esquire, coroner and attorney of our said lord the King, in the King's Bench Division of His Majesty's High Court of Justice, before the King himself, who for our said lord the King in this behalf prosecutes, does the like (a). Therefore let a jury thereupon come.

No. 76. RECORD OF INFORMATION (EX OFFICIO) FOR TRIAL.

[Same as No. 75.]

[*Using the name of the Attorney or Solicitor-General, instead of that of the King's Coroner and Attorney. Thus :*] Sir John Lawson Walton, Knight, Attorney-General of our present sovereign lord the King, who for our said lord the King in this behalf prosecutes, came here into the King's Bench Division, &c.

(z) These words may be omitted if process be not actually issued.

(a) If the plea of justification under the statute be entered, it must be added here.

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APPENDIX : STATUTES.

4 & 5 WM. & MARY, CAP. 18.

An Act to prevent malicious Informations in the Court of King's Bench, . . . [A.D. 1692.]

‘ WHEREAS divers malicious and contentious Persons have more of late than in Times past procured to be exhibited and prosecuted, Informations in their Majesties’ Court of *King's Bench* at *Westminster*, against Persons in all the Counties of *England*, for Trespasses, Batteries, and other Misdemeanours, and after the Parties so informed against have appeared to such Informations, and pleaded to Issue, the Informers do very seldom proceed any further, whereby the Persons so informed against are put to great Charges in their Defence; and although at the Trials of such Informations Verdicts are given for them, or a *Noli prosequi* be entered against them, they have no Remedy for obtaining Costs against such Informers: . . . ’ For Remedy whereof,—

Clerk of the Crown to exhibit no Information for Crimes above mentioned, except by Order of Court, nor issue Process, till Prosecutor has given £20 Recognizance to prosecute.

II. Be it enacted by the King’s and Queen’s most Excellent Majesties, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the first Day of *Easter* Term, which shall be in the Year of our Lord one thousand six hundred ninety and three, the Clerk of the Crown in the said Court of *King's Bench* for the Time being shall not, without express Order to be given by the said Court in open Court, exhibit, receive, or file any Information for any of the Causes aforesaid, or issue out any Process thereupon, before he shall have taken or shall have delivered to him a Recognizance from the Person or Persons procuring such Information to be exhibited, with the Place of his, her, or their Abode, Title, or Profession, to be entered, to the Person or Persons against whom such Information or Informations is or are to be exhibited, in the Penalty of twenty Pounds, that he, she, or they, will effectually prosecute such Informations or Information, and abide by and observe such Orders as the said Court shall direct, which

Recognizance the said Clerk of the Crown, and also every Justice of the Peace of any County, City, Franchise, or Town Corporate (where the Cause of any such Information shall arise) are hereby empowered to take; after the taking whereof by the said Clerk of the Crown, or the Receipt thereof from any Justice of the Peace, the said Clerk of the Crown shall make an Entry thereof upon Record, and shall file a Memorandum thereof in some publick Place in his Office, that all Persons may resort thereunto without Fee; and in case any Person or Persons against whom any Information or Informations for the Causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to Issue, and that the Prosecutor or Prosecutors of such Information or Informations shall not, at his and their own proper Costs and Charges, within one whole Year next after Issue joined therein, procure the same to be tried; or if upon such Trial a Verdict pass for the Defendant or Defendants, or in case the said Informer or Informers procure a *Noli prosequi* to be entered; then in any of the said Cases the said Court of *King's Bench* is hereby authorised to award to the said Defendant and Defendants, his, her, or their Costs, unless the Judge, before whom such Information shall be tried, shall at the Trial of such Information, in open Court, certify upon Record, that there was a reasonable Cause for exhibiting such Information; and in case the said Informer or Informers shall not within three Months next after the said Costs taxed, and Demand made thereof, pay to the said Defendant or Defendants the said Costs, then the said Defendant and Defendants shall have the Benefit of the said Recognizance, to compel them thereunto. [*Sections III., IV., and V. relate to Outlawry, and are repealed, except as to Outlawry in Criminal Cases (see 42 & 43 Vic. cap. 59).*]

Memorandum to be filed. Defendant shall have Costs, if Cause not tried within one Year, after Issue joined, &c.

Defendant's Remedy for Costs.

VI. Provided, That nothing in this Act relating to Informations shall extend or be construed to extend to any other Informations, than such as are or shall be exhibited in the Name of their Majesties' Coroner or Attorney in the Court of *King's Bench* for the Time being (commonly called *the Master of the Crown Office*) any thing in the said Act contained to the contrary notwithstanding.

This Act only extends to Informations by Master of Crown Office.

VII. And be it further enacted by the Authority aforesaid, That upon the Demise of any King or Queen of this Realm, all Pleas to Informations in the said Court shall stand and be good in Law, without calling Defendants to plead again to the same, unless the Defendants desire so to do, and make Request

Defendants (except desiring) not to plead again upon the King's Demise.

to the said Courts for that Purpose within five Months next after such Demise ; any Law or Usage to the contrary notwithstanding.

9 & 10 WM. III. CAP. 32.

An Act for the more effectual suppressing of Blasphemy and Profaneness. [A.D. 1698.]

WHEREAS many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this Kingdom : Wherefore, for the more effectual suppressing of the said detestable crimes, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same,—

Persons denying the Christian Religion to be true, etc., being convicted thereof, disabled to hold any Office, etc.

1. That if any person or persons, having been educated in, or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking [*deny any one of the persons in the Holy Trinity (a) to be God, or shall*] assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, and shall upon indictment or information in any of His Majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them, or any of them : And if any person or persons so convicted as aforesaid shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void : And if such person or persons shall be a second time lawfully convicted as aforesaid of all

Further Disabilities, if a second time convicted thereof.

(a) By 53 Geo. III. cap. 160, s. 2, the provisions of this Act as to denying the persons of the Holy Trinity are repealed.

or any the aforesaid crime or crimes, that then he or they shall from thenceforth be disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm; and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction.

2. Provided always, and be it enacted by the authority aforesaid, that no person shall be prosecuted by virtue of this Act for any words spoken, unless the information of such words shall be given upon oath before one or more justice or justices of the peace within four days after such words spoken, and the prosecution of such offence be within three months after such information.

No Prosecution unless Information be given in Four Days after Words spoken, etc.

3. Provided also, and be it enacted by the authority aforesaid that any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid, shall for the first offence (upon his, her, or their acknowledgment and renunciation of such offence or erroneous opinions, in the same court where such person or persons was or were convicted, as aforesaid, within the space of four months after his, her, or their conviction) be discharged from all penalties and disabilities incurred by such conviction; anything in this Act contained to the contrary thereof in anywise notwithstanding.

Person for the First Offence (on renouncing his Opinion in Four Months after Conviction) shall be Discharged from Penalty, etc.

32 GEO. III. CAP. 60.

The Libel Act, 1792 (known as Mr. Fox's Libel Act).

An Act to remove Doubts respecting the Functions of Juries in Cases of Libel. [A.D. 1792.]

WHEREAS doubts have arisen whether, on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent

Preamble.

Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

On the Trial of an Indictment for a Libel, the Jury may give a General Verdict upon the whole Matter put in Issue.

2. Provided always, that, on every such trial, the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

The Court shall give their Opinion on the Matter in Issue, as in other Criminal Cases.

3. Provided also, that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases.

Jury may find a Special Verdict.

4. Provided also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding.

Defendants may move in Arrest of Judgment.

60 GEO. III. & 1 GEO. IV. CAP. 8.

An Act for the more effectual Prevention and Punishment of Blasphemous and Seditious Libels. [30th December, 1819.]

WHEREAS it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or

publishing any blasphemous libel, or any seditious libel, tending to bring into hatred or contempt the person of His Majesty, his heirs or successors, or the Regent, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge or the court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

2. And be it further enacted, that if in any such case as aforesaid, judgment shall be arrested, or, if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and

Court to make
Order for the
Seizure of
Copies of the
Libel in
Possession of
the Persons
against whom
Verdicts shall
have been
had, &c.

Copies of
Libels so seized
to be restored
if Judgment
for Defendant;
otherwise to be
disposed of as
the Court shall
direct.

without the payment of any fees whatever : and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

[Section 3 contains similar provisions as to the seizure of libels in Scotland.]

[Sections 4, 5, and 6, were repealed by 11 Geo. IV. and 1 Wm. IV. c. 78, s. 1.]

Certificate to
be given of
Conviction of
former Libel.

7. And be it further enacted, that the clerk of assize, clerk of the peace, or other clerk or officer of the court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on His Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, to the justices of assize, oyer and terminer, great sessions, or gaol delivery where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel, for which certificate six shillings and eightpence and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender.

[Sections 8 and 9 of this statute are repealed by the 56 & 57 Vict. c. 61, s. 2.]

3 & 4 VICT. CAP. 9.

An Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers. [14th April, 1840.]

WHEREAS it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published : And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being

taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act.

2. And be it enacted, that, in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such

Proceedings,
Criminal or
Civil, against
Persons for
Publication of
Papers printed
by Order of
Parliament to
be stayed upon
Delivery of a
Certificate that
such Publica-
tion is by
Order of either
House of
Parliament.

Proceedings to
be stayed when
commenced in
respect of a

Copy of an
authenticated
Report, &c.

report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants, at any stage of the proceedings, to lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act.

In Proceedings
for printing
any Extract,
&c., it may
be shown that
such was *bonâ
fide* made.

3. And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

Act not to
affect the
Privileges of
Parliament.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

6 & 7 VICT. CAP. 96.

The Libel Act, 1843 (known as Lord Campbell's Libel Act).

An Act to amend the Law respecting Defamatory Words and Libel. [24th August, 1843.]

Offer of an
Apology
admissible in
Evidence in
mitigation of
Damages.

For the better protection of private character, and for more effectually securing the liberty of the Press, and for better preventing abuses in exercising the said liberty: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff

for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

2. And be it enacted, that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action (b); and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea.

In an Action against a Newspaper for Libel, the Defendant may plead that it was inserted without Malice and without Neglect.

3. And be it enacted, that if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.

Publishing or threatening to publish a Libel, or proposing to abstain from publishing anything, with Intent to extort Money, punishable by Imprisonment and Hard Labour.

4. And be it enacted, that if any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to

False Defamatory Libel punishable by Imprisonment and Fine.

(b) The words here omitted, which related to the payment of money into Court, have been repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59, Sched. Part II.), and by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 4.

be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

Malicious
Defamatory
Libel by
Imprisonment
or Fine.

5. And be it enacted, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Proceedings
upon the Trial
of an Indict-
ment or Infor-
mation for a
Defamatory
Libel.

6. And be it enacted, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea or justification; Provided also, that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty; Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel.

Double Plea.

Proviso as to
Plea of Not
Guilty in Civil
and Criminal
Proceedings.

Evidence to
rebut *prima
facie* Case of
Publication by
an Agent.

7. And be it enacted, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given

which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

8. And be it enacted, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.

On Prosecution
for Private
Libel, Defen-
dant entitled
to Costs on
Acquittal.

9. And be it enacted, that wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.

Interpretation
of Act.

10. And be it enacted, that this Act shall take effect from the first day of November next; and that nothing in this Act contained shall extend to Scotland.

Commence-
ment and
Extent of Act.

8 & 9 VICT. CAP. 75.

An Act to Amend an Act passed in the Session of Parliament held in the Sixth and Seventh Years of the Reign of her present Majesty, intituled "An Act to amend the Law respecting defamatory Words and Libel." [31st July, 1845.]

WHEREAS by an Act passed in the session of Parliament held 6 & 7 Vict. in the sixth and seventh years of the reign of her present Majesty, intituled "An Act to amend the Law respecting

c. 96.

defamatory Words and Libel," it is, amongst other things, enacted and provided, that the defendant in an action for libel contained in any public newspaper or other periodical publication, may plead certain matters therein mentioned, and may, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel; and it is thereby further enacted, that such payment into court shall be of the same effect, and be available in the same manner, and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts therein before required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled

3 & 4 Wm. IV.
c. 42.

"An Act for the further Amendment of the Law, and the better Advancement of Justice:" And whereas the said Act of the fourth year of the reign of his late Majesty relates only to proceedings in the superior courts in England, but by an Act passed in the session of Parliament held in the third and fourth years of the reign of her present Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil actions, except in Certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for the further advancement of Justice, in Ireland," a like provision is made for payment of money into court in all personal actions pending in any of the superior courts in Ireland, as is contained in the said Act of the fourth year of the reign of his late Majesty in regard to actions pending in the superior courts in England with a like exception of actions for libel; and it is expedient to prevent any doubts as to the application of the said recited Act of the sixth and seventh years of the reign of her present Majesty to actions pending in the superior Courts of Ireland, which may be created by reason of the omission of a reference in the last-mentioned Act to the said Act of the third and fourth years of the reign of her present Majesty: Be it therefore enacted and declared by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that when in any action pending in the superior courts in Ireland for a libel contained in any public newspaper or other periodica

3 & 4 Vict.
c. 105.

In Cases of
Action for
Libel in
Ireland where
Defendant
shall plead
Matters
allowed by
3 & 4 Wm. IV.
c. 42, and pay
Money into

publication, the defendant shall plead the matters allowed to be pleaded by the said first-mentioned Act, and shall, on filing such plea, pay money into court as provided by such Act, such payment into court shall be of the same effect, and be available in the same manner, and to the same extent, and be subject to the same rules and regulations now in force, or hereafter to be made, as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts so required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under the said recited Act of the third and fourth years of the reign of Her present Majesty.

2. And be it declared and enacted, that it shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into court by way of amends (c), but every such plea so filed without payment of money into court shall be deemed a nullity, and may be treated as such by the plaintiff in the action.

Court, such Payment to be of same effect as if required by said Act.

Defendant not to file such Plea without paying Money into Court by way of Amends.

18 & 19 VICT. CAP. 41.

An Act for Abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in Suits for Defamation.
[26th June, 1855.]

WHEREAS the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the Church, and has become grievous and oppressive to the subjects of this realm: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. From and after the passing of this Act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute, law, canon, custom, or usage to the contrary notwithstanding.

Jurisdiction of Ecclesiastical Courts in England, &c., in Suits for Defamation abolished.

(c) See note (b), *supra*, p. 589.

Persons in
Custody for
Defamation
under Order
of Ecclesiasti-
cal Courts to
be discharged,
but such
Order not to
be made until
Costs are paid.

2. In the case of every person committed to gaol before the passing of this Act under any writ *de contumace capiendo*, issued in consequence of any proceedings before any ecclesiastical court, in any cause or suit for defamation of character, the judge of the ecclesiastical court before whom such proceedings shall have been had shall make an order upon the officer in whose custody such person is for discharging such person out of custody, and such officer shall, on the receipt of such order, forthwith discharge such person; and it shall not be necessary for such person to take any oath of future obedience to his or her ordinary: Provided always, that such order shall not be made unless the costs lawfully incurred in any such suit shall have been previously paid into the registry of such ecclesiastical court, or unless the person against whom such costs shall have been decreed shall have already suffered imprisonment for one month in consequence of non-payment thereof.

[Similar provisions for abolishing the jurisdiction of the ecclesiastical courts in *Ireland* are contained in the 23 & 24 Vict. cap. 32.]

20 & 21 VICT. CAP. 83.

An Act for more effectually Preventing the Sale of Obscene Books, Pictures, Prints, and other Articles. [25th August, 1857.]

WHEREAS it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Justices, &c.,
may authorise
Search of
suspected
premises.

1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or

distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall

forthwith direct them to be restored to the occupier of the house or other place in which they were seized.

**Tender of
Amends, &c**

2. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought: and in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

**Limitation of
Actions.**

3. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to prosecute such action, suit, information, or other proceeding, to the intended defendant, one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding, shall be brought or commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.

Appeal.

4. Any person aggrieved by any act or determination of such magistrate or justices in or concerning the execution of this Act, may appeal to the next general or quarter sessions for the county, riding, division, city, borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace whose act or determination shall be appealed against notice in writing of such appeal, and of the grounds thereof, within seven days after such act or determination, and before the next general or quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay

such costs as shall be awarded by such court of quarter sessions or any adjournment thereof, and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet; and such court, upon hearing and finally determining such appeal, shall and may according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and if such appeal be dismissed or decided against the appellant or be not prosecuted, such court may order the articles seized forthwith to be destroyed: Provided always, that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination than those set forth in such notice of appeal.

5. This Act shall not extend to Scotland.

Act not to
extend to
Scotland.

THE NEWSPAPERS, PRINTERS, AND READING ROOMS REPEAL ACT, 1869.

32 & 33 VICT. CAP. 24.

An Act to repeal certain enactments relating to Newspapers, Pamphlets, and other publications, and to Printers, Type-founders, and Reading Rooms. [12th July, 1869.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Acts and parts of Acts described in the first schedule to this Act are hereby repealed, but the provisions of the said Acts which are set out in the second schedule to this Act shall continue in force in the same manner as if they were enacted in the body of this Act (d).

Acts and parts
of Acts in
first schedule
repealed,
except as in
second
schedule.

2. This Act may be cited as "The Newspapers, Printers, and Reading Rooms Repeal Act, 1869."

(d) The words omitted were repealed by the Statute Law Revision Act, 1883.

FIRST SCHEDULE.

Date of Act.	Title of Act, and part repealed.
36 Geo. III. c. 8.	An Act for the more effectually preventing seditious meetings and assemblies.
39 Geo. III. c. 79 in part.	<div> <div>An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices.</div> <div>In part, namely,—sections fifteen to thirty-three, both inclusive, and so much of sections 34 to 39 as relates to the above-mentioned sections.</div> </div>
51 Geo. III. c. 65.	An Act to explain and amend an Act passed in the thirty-ninth year of His Majesty's reign, intituled "An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices," so far as respects certain penalties on printers and publishers.
55 Geo. III. c. 101 in part.	<div> <div>An Act to regulate the collection of stamp duties and matters in respect of which licences may be granted by the commissioner of stamps in Ireland</div> <div>In part, namely,—Section 13.</div> </div>
60 Geo. III. & 1 Geo. IV. c. 9.	An Act to subject certain publications to the duties of stamps upon newspapers, and to make other regulations for restraining the abuses arising from the publication of blasphemous and seditious libels.

FIRST SCHEDULE—*continued.*

Date of Act.	Title of Act, and part repealed.
11 Geo. IV. & 1 Will. IV. c. 73.	An Act to repeal so much of an Act of the sixtieth year of His late Majesty King George the Third, for the more effectual prevention and punishment of blasphemous and seditious libels, as relates to the sentence of banishment for the second offence, and to provide some further remedy against the abuse of publishing libels.
6 & 7 Will. IV. c. 76 in part.	<div style="display: flex; align-items: center;"> <div style="flex: 1;"> An Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements . . . </div> <div style="flex: 1; padding-left: 10px;"> In part, namely,— Except sections 1 to 4 (both inclusive), sections 34 and 35, and the schedule. </div> </div>
2 & 3 Vict. c. 12.	An Act to amend an Act of the thirty-ninth year of King George the Third, for the more effectual suppression of societies established for seditious and treasonable purposes, and for preventing treasonable and seditious practices, and to put an end to certain proceedings now pending under the said Act.
5 & 6 Vict. c. 82 in part.	<div style="display: flex; align-items: center;"> <div style="flex: 1;"> An Act to assimilate the stamp duties in Great Britain and Ireland, and to make regulations for collecting and managing the same until the tenth day of October one thousand eight hundred and forty-five . . . </div> <div style="flex: 1; padding-left: 10px;"> In part, namely,— The following words in section 20 “and also licence to any person to keep any printing presses and types for printing in Ireland.” </div> </div>

FIRST SCHEDULE—*continued*.

Date of Act.	Title of Act, and part repealed.	
9 & 10 Vict. c. 33 in part.	An Act to amend the laws relating to corresponding societies and the licensing of lecture rooms . . .	In part, namely,— So far as it relates to any proceedings under the enactments repealed by this schedule.
16 & 17 Vict. c. 59 in part.	An Act to repeal certain stamp duties and to grant others in lieu thereof, to amend the laws relating to stamp duties, and to make perpetual certain stamp duties in Ireland.	In part, namely,— So much of section 20 as makes perpetual the provisions of 5 & 6 Vict. c. 82, repealed by this Act.

SECOND SCHEDULE.

The enactments in this schedule, with the exception of section 19 of 6 & 7 Will. IV. c. 76, do not apply to Ireland.

39 Geo. III. c. 79.

Section 28.

Not to extend to papers printed by authority of Parliament.

Nothing in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.

Section 29.

Printers to keep a copy of every paper they print, and write thereon the name and abode of their employer.

Every person who shall print any paper for hire, reward, gain or profit, shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the

SECOND SCHEDULE—*continued*.

same ; and every person printing any paper for hire, reward, gain, or profit, who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal forfeit and lose the sum of twenty pounds.

Penalty of £20 for neglect or refusing to produce the Copy within six months.

Section 31.

Nothing herein contained shall extend to the impression of any engraving, or to the printing by letter-press of the name, or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.

Not to extend to impressions of engravings or the printing names and addresses.

Section 34.

No person shall be prosecuted or sued for any penalty imposed by this Act, unless such prosecution shall be commenced, or such action shall be brought, within three calendar months next after such penalty shall have been incurred.

Prosecutions to be commenced within three months after penalty is incurred.

Part of Section 35.

And any pecuniary penalty imposed by this Act, and not exceeding the sum of twenty pounds, shall and may be recovered before any justice or justices of the peace for the county, stewardry, riding, division, city, town, or place in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way.

Recovery of penalties.

Section 36.

All pecuniary penalties hereinbefore imposed by this Act shall, when recovered in a summary way before any justice, be applied and disposed of in manner hereinafter mentioned ; that is to say, one moiety thereof to the informer before any justice, and the other moiety thereof to His Majesty, his heirs and successors.

Application of penalties.

SECOND SCHEDULE—*continued*.

51 GEO. III. CAP. 65.

Section 3.

Name and residence of printers not required to be put to bank notes, bills, &c., or to any paper printed by authority of any public board or public office.

Nothing in the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, or in this Act contained, shall extend or be construed to extend to require the name and residence of the printer to be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England, upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money, or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorized or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities, or upon any receipt for money or goods, or upon any proceeding in any court of law or equity, or in any inferior court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed.

 6 & 7 WILL. IV. CAP. 76.

Section 19.

Discovery of proprietors, printers, or publishers of newspapers may be enforced by bill, &c.

If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such discovery shall not be made

SECOND SCHEDULE—*continued.*

use of as evidence or otherwise in any proceeding against the defendant, save only the proceeding for which the discovery is made.

2 & 3 VICT. CAP. 12.

Section 2.

Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds: Provided always that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, either in the said Act or by any Act made for the amendment thereof.

Penalty upon printers for not printing their name and residence on every paper or book, and on persons publishing the same.

Section 3.

In the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

As to books or papers printed at the university presses.

Section 4.

Provided always, that it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information in any of Her Majesty's courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred or which may hereafter be incurred under the provisions of this Act, unless

No actions for penalties to be commenced except in the name of the Attorney or Solicitor General in England or the Queen's Advocate in Scotland.

SECOND SCHEDULE—*continued*.

the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in that part of Great Britain called England, or Her Majesty's Advocate for Scotland (as the case may be respectively); and if any action, bill, plaint, or information shall be commenced, prosecuted, or filed in the name or names of any other person or persons than is or are in that behalf before mentioned, the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes.

9 & 10 VICT. CAP. 33.

Section 1.

Proceedings shall not be commenced unless in the name of the law officers of the Crown.

It shall not be lawful for any person or persons to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint or information in any of Her Majesty's courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine which may hereafter be incurred under the provisions of the Act of the thirty-ninth year of King George the Third, chapter seventy-nine, set out in this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in England or Her Majesty's Advocate in Scotland, and every action, bill, plaint, or information which shall be commenced, prosecuted, entered, or filed in the name or names of any other person or persons than is in that behalf before mentioned, and every proceeding thereupon had, shall be null and void to all intents and purposes.

THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

44 & 45 VICT. CAP. 60.

A. D. 1881. *An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper proprietors.* [27th August, 1881.]

WHEREAS it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel:

And whereas it is also expedient to provide for the registration of newspaper proprietors :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. In the construction of this Act, unless there is anything Interpretation. in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following ; (that is to say,)

The word " registrar " shall mean in England the registrar " Registrar," meaning of. for the time being of joint-stock companies, or such person as the Board of Trade may for the time being authorise in that behalf, and in Ireland the assistant registrar for the time being of joint-stock companies for Ireland, or such person as the Board of Trade may for the time being authorise in that behalf.

The phrase " registry office " shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word " newspaper " shall mean any paper containing " Newspaper," what is. public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty six days between the publication of any two such papers, parts, or numbers.

Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word " occupation " when applied to any person shall " Occupation." mean his trade or following, and if none, then his rank or usual title, as esquire, gentleman.

The phrase " place of residence " shall include the street, " Place of residence." square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word " proprietor " shall mean and include as well the " Proprietor," meaning of. sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

[Sections 2 and 3 have been repealed by 51 & 52 Vict. c. 64, ss. 2 and 8.]

Inquiry by court of summary jurisdiction as to libel being for public benefit or being true.

4. A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the Court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Provision as to summary conviction for libel.

5. If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty, the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

42 & 43 Vict. c. 49.

Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

11 & 12 Vict. c. 43.

22 & 23 Vict. c. 17, made applicable to this Act.

6. Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours."

Board of Trade may authorise registration of

7. Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry

of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible "representative proprietors."

8. A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar. Register of newspaper proprietors to be established.

9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the thirty-first of July one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to the Schedule A. hereunto annexed; that is to say, Annual returns to be made.

(a.) The title of a newspaper;

(b.) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.

10. If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time. Penalty for omission to make annual returns.

11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor or any new proprietor is introduced may at any time make or cause to be made to the Registry Office a return according to the Schedule B. hereunto annexed and containing the particulars therein set forth. Power to party to make return.

12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit Penalty for wilful misrepresentation in or omission from return.

any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

Registrar to enter returns in register.

13. It shall be the duty of the registrar and he is hereby required forthwith to register every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the Registry Office and called "the register of newspaper proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during the hours of business at the Registry Office, and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being or under the official seal of the registrar.

Fees payable for registrar's services.

14. There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the register of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other services to be performed by the registrar, such fees (if any) as the Board of Trade with the approval of the Treasury may direct and as they shall deem requisite to defray as well the additional expenses of the Registry Office caused by the provisions of this Act, as also the further remunerations and salaries (if any) of the registrar, and of any other persons employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

Copies of entries in and extracts from register to be evidence.

15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

Recovery of penalties and enforcement of orders.

16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Summary orders under this Act may be made by a court of

summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1879; and, for the purposes of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

17. The expression "a court of summary jurisdiction" has in England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

The expression "Summary Jurisdiction Acts" has as regards England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland, means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

18. The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

19. This Act shall not extend to Scotland.

20. This Act may for all purposes be cited as the Newspaper Libel and Registration Act, 1881.

Definitions.
14 & 15 Vict.
c. 93.

Provisions as to registration of newspaper proprietors not to apply to newspaper belonging to a joint stock company.

Act not to extend to Scotland.

Short title.

The SCHEDULES to which this Act refers.

SCHEDULE A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of business (if any) of the Proprietors.	Places of Residence of the Proprietors.

F.S.

R R

SCHEDULE B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors.	Places of business (if any) of new Proprietors.	Places of Residence of new Proprietors.

THE LAW OF LIBEL AMENDMENT ACT, 1888.

51 & 52 VICT. CAP. 64. [24th December, 1888.]

WHEREAS it is expedient to amend the law of libel :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Interpretation.

1. In the construction of this Act the word "newspaper" shall have the same meaning as in the Newspaper Libel and Registration Act, 1881.

Repeal of
44 & 45 Vict.
c. 60, s. 2.

2. Section two of the Newspaper Libel and Registration Act, 1881, is hereby repealed.

Newspaper
reports of
proceedings
in court
privileged.

3. A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

Newspaper
reports of
proceedings of
public meet-
ings and of

4. A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any

meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

For the purposes of this section "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. "Public Meeting," meaning of.

5. It shall be competent for a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and after such order has been made, and before the trial of the said actions, the defendants in any new actions instituted in respect to the same, or substantially the same, libel shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated. Consolidation of actions.

Assessment
and apportion-
ment of
Damages in
actions con-
solidated.

Order as to
apportionment
of Costs.

Power to
defendant to
give certain
evidence in
mitigation of
damages.

Obscene matter
need not be set
forth in indict-
ment or other
judicial pro-
ceeding.

Repeal of
44 & 45 Vict.
c. 60, s. 3.
Order of
Judge required
for prosecution
of newspaper
proprietor, &c.

Person pro-
ceeded against

In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants.

6. At the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought.

7. It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding.

8. Section three of the forty-fourth and forty-fifth Victoria, chapter sixty, is hereby repealed, and instead thereof be it enacted that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained.

Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application.

9. Every person charged with the offence of libel before

any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent, but not compellable, witnesses, on every hearing at every stage of such charge.

10. This Act shall not apply to Scotland.

Extent of Act.

11. This Act may be cited as the Law of Libel Amendment Act, 1888.

THE INDECENT ADVERTISEMENTS ACT, 1889.

52 & 53 VICT. CAP. 18.

An Act to suppress Indecent Advertisements. [26th July, 1889.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as The Indecent Advertisements Act, 1889.

2. This Act shall come into operation on the first day of January one thousand eight hundred and ninety.

Commencement of Act.

3. Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree, or any other thing whatsoever so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver, or exhibits, to any inhabitant or to any person being in or passing along any street, public highway, or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture or printed or written matter which is of an indecent or obscene nature, shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding forty shillings, or, in the discretion of the court, to imprisonment for any term not exceeding one month, with or without hard labour.

Summary proceedings against persons affixing, &c., indecent or obscene pictures or printed or written matter.

4. Whoever gives or delivers to any other person any such pictures, or printed or written matter mentioned in section three of this Act with the intent that the same, or some one or more thereof, should be affixed, inscribed, delivered, or exhibited as therein mentioned, shall, on conviction in manner

Summary proceedings against persons sending others to do the acts punishable under s. 3.

provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding five pounds, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour.

Certain
advertisements
declared
indecent.

5. Any advertisement relating to syphilis, gonorrhœa, nervous debility, or other complaint or infirmity arising from or relating to sexual intercourse, shall be deemed to be printed or written matter of an indecent nature within the meaning of section three of this Act, if such advertisement is affixed to or inscribed on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree, or other thing whatsoever, so as to be visible to a person being in or passing along any street, public highway, or footpath, or is affixed to or inscribed on any public urinal, or is delivered, or attempted to be delivered to any person being in or passing along any street, public highway, or footpath.

Constable may
arrest on view
of offence.

6. Any constable or other peace officer may arrest without warrant any person whom he shall find committing any offence against this Act.

Interpretation.

7. In this Act the expression "Summary Jurisdiction Acts"—

42 & 43 Vict.
c. 49.

In England means the Summary Jurisdiction (English) Acts within the meaning of the Summary Jurisdiction Act, 1879;

27 & 28 Vict.
c. 53.

In Scotland means the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Acts amending the same;

44 & 45 Vict.
c. 33.

and

In Ireland means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district or of the police of such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict.
c. 93.

THE SLANDER OF WOMEN ACT, 1891.

54 & 55 VICT. CAP. 51.

An Act to amend the Law relating to the Slander of Women.

[5th August, 1891.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and

temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable. Amendment of law.

Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action.

2. This Act may be cited as the Slander of Women Act, 1891, and shall not apply to Scotland. Short title and extent.

THE CORRUPT AND ILLEGAL PRACTICES PREVENTION ACT, 1895.

58 & 59 VICT. CAP. 40.

An Act to amend the Corrupt and Illegal Practices Prevention Act, 1883. [6th July, 1895.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows:—

1. Any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice within the meaning of the provisions of the Corrupt and Illegal Practices Prevention Act, 1883, and shall be subject to all the penalties for and consequences of committing an illegal practice in the said Act mentioned, and the said Act shall be taken to be amended as if the illegal practice defined by this Act had been contained therein. Certain false statements concerning a candidate to be an illegal practice.

2. No person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. 46 & 47 Vict. c. 51. Evidence on hearing of charge under the Act.

Any person charged with an offence under this Act, and the

husband or wife of such person, as the case may be, shall be competent to give evidence in answer to such charge.

Injunction
against person
making false
statement.

3. Any person who shall make or publish any false statement of fact as aforesaid, may be restrained by interim or perpetual injunction by the High Court of Justice from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purpose of granting an interim injunction *prima facie* proof of the falsity of the statement shall be sufficient.

Candidate
exonerated in
certain cases
of illegal prac-
tice by agents.

4. A candidate shall not be liable, nor shall be subject to any incapacity, nor shall his election be avoided, for any illegal practice under this Act committed by his agent other than his election agent, unless it can be shown that the candidate or his election agent has authorised or consented to the committing of such illegal practice by such other agent, or has paid for the circulation of the false statement constituting the illegal practice, or unless upon the hearing of an election petition the election court shall find and report that the election of such candidate was procured or materially assisted in consequence of the making or publishing of such false statements.

Short title.

5. This Act may be cited as the Corrupt and Illegal Practices Prevention Act, 1895, and shall be construed as one with the Corrupt and Illegal Practices Prevention Act, 1888, and that Act and this Act may be cited together as the Corrupt and Illegal Practices Prevention Acts, 1888 and 1895.

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Ex. J. M.
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